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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-741

MY STORE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BLAKEMORE-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. .....

MY STORE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, My Store, Inc., prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case (its cases Nos. 14,770 and 71-1491) entered on October 18, 1972.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 18, 1972. This petition is filed within ninety days thereafter as required by Title 28, Paragraph 2101, subparagraph C, and the jurisdiction of this Court is invoked under Title 28, Section 1254, Paragraph (1).

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (Exhibit H)[1] has not yet been officially reported.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. (No. 141 et seq.).

QUESTIONS PRESENTED.

1. Can a man "wilfully and contumaciously" commit an act "with knowledge" that it is in violation of a court order which was not entered until 18 months later?

2. Can such a finding, enforced at the time by threat of immediate incarceration, be res adjudicata in subsequent proceedings involving different issues?

3. Can such a finding, which attributes clairvoyance to the Petitioner, be used as a basis of depriving him of rights and defenses which he otherwise would have had?

4. Has Pasquo Podeschi from Taylorville, Illinois, had a raw deal from his government?

STATEMENT.

This petition has been filed because the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this

1. The Petitioner has requested that the Appendix which was submitted to the Court of Appeals for the Seventh Circuit in this matter be certified as the record for the purposes of this Petition. References to the record shall relate to the page numbers of the Appendix and shall appear as follows: (App. .....); references to orders of the Court of Appeals and the National Labor Relations Board which are appended to this Petition shall appear as follows: (Exhibit .....).

Court's power of supervision, and in so doing has completely ignored previous decisions of this Court relating to contempt proceedings.

This is the petition for relief of My Store, Inc., whose President, Pasquo Podeschi, its majority stockholder, believes that he (it) has received the rawest kind of a raw deal from the United Retail Workers Union, the National Labor Relations Board and the United States Court of Appeals for the Seventh Circuit. It will be a brief, concise narration of what has happened to just one plain citizen, not cluttered up with references to a record too voluminous to expect a busy Court to probe at this stage of the game. It is the story of the life of Pasquo Podeschi who was brought to the United States when he was age 8 by his parents who emigrated from Italy in 1911, and his father and brothers found work in the coal mines. It was a big family and the going was tough and Pasquo quit school after the 7th grade and got a job to help out. In time, he became a push-cart peddler of fruits and vegetables and then moved up to a "Mom and Pop" grocery store, and by dint of hard work and long hours finally built a supermarket in Taylorville, Illinois, which with great pride he called "My Store," (a name which later elicited a snicker from the bright young attorneys for the National Labor Relations Board who were never able to understand a "bootstraps" rugged individualist).

Although a supermarket in size, Podeschi and his wife continued to operate it pretty much on the "Mom and Pop" lines (and they still do). The business prospered and he was eventually able to build another similar store in Mattoon, Illinois, a city approximately 70 miles from Taylorville.

Late in 1962, the United Retail Workers Union (Independent) undertook to organize the Taylorville My Store

and filed appropriate documents with the St. Louis Regional Office of the NLRB. Podeschi consented to an election, which was held on February 21, 1963. The Union and the NLRB insisted on voting four high school boys who were working in the store only part-time under a Distributive Education program of the local high school. The Union won the election 26-22. Even before the Union was certified, Podeschi agreed to commence bargaining negotiations with the Union, which presented him with a 15 page contract proposal (like those used with the big chain stores). It contained what was to him a lot of gobbledy gook about pregnancy leaves, funeral leaves, union cooperation, management rights, 24 hour posting of work schedules, extra pay for the night shift, call-in guarantees, no split shifts, seniority, employees to be paid to nearest quarter hour, clean up time, layoff, rehiring, transfers and promotions, appointment of department managers, etc., etc.

A number of bargaining sessions followed, during which all of the economic terms (wages, hours, etc.) were agreed upon, but they fell out on (a) union shop, (b) appointment of department heads, and (c) the term of the agreement. The Union insisted that Podeschi had to run his store like a big chain supermarket and appoint department heads (meat, produce, dairy, frozen foods, etc.). Podeschi *didn't* run his store that way, so he refused. His employees were trained to and worked at whatever jobs needed to be done in the store from time to time. The Union insisted on a union shop. Inasmuch as he believed that of his 44 regular employees 22 had voted for the Union and 22 against, Podeschi stated that he would not force anyone to join the Union but would agree to an open shop. The Union insisted on a two-year contract but Podeschi felt that he would have to "live and learn" in this new world and was agreeable to only a one-year contract.

The last bargaining session was held on April 21, with only these major three items, i.e., closed shop, department heads and length of contract unresolved.

The Union lost no time in calling a strike which commenced on May 3, 1963. By that time, there were 48 employees and only 20 of them went out on the picket line, one quit, the other 27 staying at work. It was, therefore, a minority strike from the beginning and remained so during the whole three years of its duration. A week after the strike started, Podeschi offered their jobs back to the strikers, in writing, which offer was perfunctorily declined by the Union. The Union ran advertisements in the local newspaper, stating that the strikers would lose nothing by virtue of the strike and the Union would pay each striker his or her *full take-home pay* in lieu of strike benefits.

On the day after the strike started, the Union filed an unfair labor practice charge against Podeschi with the St. Louis Regional Office of the NLRB.

Much bitterness developed between the strikers (who were mostly newer employees) and those who stayed on the job (most of whom had been working for Podeschi for years). The strike went on and Taylorville is a strong union town, so it put a real dent in Podeschi's business. On July 11, 1963, the Union offered to return the strikers to work in a body. Because of the bitterness which was mounting, Podeschi was fearful that bringing the strikers back in a body would result in a real knock-down, drag-out, but he offered to take them back in groups of two or three at a time as the improvement of the business justified, as they could be merged into the inside employees, and in accordance with their seniority. The Union insisted on whole hog or none.

On July 17, the NLRB filed a complaint charging

violation of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act which, after some amendments, was at issue and heard before a Trial Examiner at Taylorville on September 10, 11 and 12, 1963. Attorneys for the Board, the Union and Podeschi participated and there was much conflict in the evidence. The chasm between the striking and nonstriking employees grew wider. "Scab" and other less printable epithets flew right and left.

From the trend of the Trial Examiner's demeanor and rulings it was the opinion of Podeschi's attorneys that the Examiner might rule against Podeschi, in which event a liability for back pay would become involved. The attorneys advised Podeschi to make new offers of reinstatement to the strikers to toll back pay. All sorts of epithets were flying fast and loose between the strikers and those who crossed the picket line to work and their hostility was near the boiling point. Most of the working employees told Podeschi that if the strikers were brought back in a body, there "would be hell to pay" and they said that if the strikers were let in, *they* would walk out. Podeschi was fearful of such consequences so upon the advice of counsel he mailed offers of reinstatement through September 20 to October 3 to the strikers, three or four at a time, and requested their reply within 48 hours in each instance. Some replied saying that they would like to return to work but had been instructed by the Union not to accept unless taken back as an entire group. The rest did not respond. These offers were made after the hearing before the Trial Examiner had been concluded.

Subsequently, on December 3, 1963, the Trial Examiner issued his decision finding unfair labor practices, ordering that offers of reinstatement be made to the strikers, that notices be posted, etc. His findings were subsequently approved by the Board, which additionally found that the

strikers would be entitled to back pay from July 11, 1963 (when they made their offer to return to work) until they were given offers of reinstatement. *My Store, Inc.*, 181 NLRB No. 47 (Exhibit D). That Podeschi had already given new offers of reinstatement *after* the hearing before the Trial Examiner, of course, was not in the record, so the validity of these offers was not before or ruled on by the Board. Upon enforcement proceedings thereafter, the U. S. Court of Appeals for the Seventh Circuit found substantial evidence to support the Board order and it was enforced by decree dated April 7, 1965 (*NLRB* v. *My Store, Inc.*, 345 F. 2d 494).[2] It is this order that Podeschi is supposed to have wilfully, contumaciously and with knowledge, violated by the reinstatement offers made 18 months before.

Counsel for Podeschi promptly advised the Regional Director for the Fourteenth Region of his readiness to comply in all respects with the Court's order, excepting that inasmuch as he had already made offers of reinstatement (the offers of September 20-October 3, 1963) following the Trial Examiner's hearing, the notices to be posted should be revised as to the portion "we will offer the employees . . . immediate and full reinstatement to their former positions . . ." and whatever back pay was due could be settled by a back pay specification.

Nine months passed with no reply and then out of a clear sky the Board filed a civil contempt proceeding with the Court, claiming that because the offers of September 20-October 3, 1963, were staggered, they were not bona fide! Hearing was held before the Court and inasmuch as the offers had been given *after* the hearing before the Trial Examiner they were not in the record, and thus their validity had not been adjudicated.

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2. This is the same order which the Court of Appeals sometimes refers to as the "decree of July 6, 1965."

The Court referred the matter to its Master in Chancery, James Overton Brooks, to determine "(1) Whether *prior to the decree of July 6, 1965, to-wit, in September and October 1963,* My Store, Inc., had made bona-fide and valid offers to the unfair labor practice strikers." (App. p. 279.)

The Master found every fact in favor of My Store, Inc. (Pasquo Podeschi), including the following:

> "K. That the manner and form whereby the respondent, My Store, Inc., mailed a communication to the various strikers between the dates of September 20, 1963 and October 7, 1963, offering full reinstatement with similar hours and pay rates and other conditions being assured to be similar as to those existing prior to the strike was justified and in conformity with good business practice for the purpose of proper assimulation of the strikers in the work force in an orderly and intelligent manner for the purpose of eliminating confusion and particularly for eliminating disturbances between oncoming strikers and non-strikers and to permit management to supervise the incoming strikers in an intelligent and orderly manner.
>
> "L. That there existed bad feelings between strikers and non-strikers.
>
> "M. That the management of My Store, Inc. held no bias nor animosity against the strikers." (App. p. 302.)

and concluded as a matter of law as follows:

> "1. That in September and October 1963 the respondent My Store, Inc., had made valid offers of reinstatement to the unfair labor practice strikers. . . .
>
> • • • • •
>
> "4. The pleadings raise the question of whether the respondent, My Store, Inc., could legally call back the strikers on a staggered basis between the dates of September 20, 1963 and October 7, 1963; this is wholly justified on the basis of the holding by this Court in *N. L. R. B.* v. *Abbott Publishing Company,* 331 F. 2d

209 and the holding in the case of *N. L. R. B.* v. *Giannasca*, 119 F. 2d 756, along with the holding of *Snow* v. *N. L. R. B.*, 308 F. 2d 687, all of which are discussed in above Analysis of Authorities.

"5. That strikers failed, refused and neglected to accept the offer of reinstatement made to them by My Store, Inc.

"6. That no valid reason was given the respondent, My Store, Inc. by the strikers for their failure, refusal and neglect to accept the offer made to them of reinstatement.

"7. That the strikers by their failure, refusal and neglect to accept said offer of reinstatement legally precluded themselves from further employment with My Store, Inc., and by their said actions absolved the respondent from any further need to make a renewed offer.

"8. That the making of the offers of reinstatement between September 20, 1963, and October 7, 1963, gave no presumption of bad faith.

"9. The burden of proof lies wholly on the petitioner and each charge must be proven without relying upon inferences and suppositions.

"10. The petitioner failed to establish by the requisite proof the allegations it made praying for an order of adjudication of the respondent, My Store, Inc., in civil contempt.

"11. That the equities are with the respondent." (App. pp. 303-304.)

Thereafter, the Court without any supporting evidence on the record repudiated its Special Master in an incredible decision in which it held that the offers were not valid because they "were made wilfully and contumaciously with knowledge that they were not in compliance with the decree of this court." We said incredible because how could the man have made offers in September and October of 1963 *with knowledge* that they were made "wilfully and con-

tumaciously" in defiance of a decree of the Court which was not entered until nearly *eighteen months later*, on April 7, 1965! *NLRB* v. *My Store, Inc.*, 345 F. 2d 494 (7th Cir.) *cert. den'd*, 382 U. S. 927 (1965). The Court was wrong—dead wrong—as wrong as if it had found that the law of gravity had been repealed.[3] No appeal from this order was feasible because the U. S. Marshal was ordered to arrest Podeschi and put him in jail if he did not immediately "knuckle under" and accept this complete distortion of the facts.[4] As wrong as it was, and for all to see, Podeschi had the words "wilful and contumacious" hung around his neck, and it has plagued him erroneously and unjustly ever since. Nevertheless, Podeschi made new offers of reinstatement immediately and was purged of the contempt by the Court. In its order of April 7, 1965, the Court, *inter alia*, directed the Board to prepare a back pay specification. Podeschi complied with the order in every way, even sending his accountant to St. Louis to help the Regional Office with its preparation of the back pay specifications. The strike continued until July 31, 1966.

The parties continued bargaining but could not agree upon the Union shop and department heads provisions and finally mutually agreed to discontinue bargaining and the Union disclaimed further interest in the employees. During the entire period of the strike, the Union had paid the strikers weekly the same as their take-home pay would have been if working. There was no incentive for them

3. The Court at the time was reminded of this Court's holdings and admonitions that contempt of court is not to be based on mere inference, but requires clear and convincing proof. *Oriel* v. *Russell*, 278 U. S. 358 (1929).

4. As is apparent from the February 23, 1968 order (Exhibit A), the Court undertook to decide this matter "in conference," and Petitioner's counsel was denied the right to appear before the Court and be heard in connection with the incredible decision and the amended order which followed in April 1968 (Exhibit B).

to seek work. In the beginning of the strike the Union had treated the strikers as employees and had so reported them for Federal tax purposes. It later changed this procedure and had the strikers sign "loan agreements," backdated more than one year, in which it was recited that the weekly pay would be considered a loan, to be repaid without interest only from the proceeds of any back pay awarded to them. For reasons never given, the St. Louis Office took months and months to prepare and file the back pay specifications. Hearing on the back pay specifications was held before a Trial Examiner on December 2 through 5, 1968, and January 20 through January 23, 1969, in Taylorville and St. Louis. Podeschi interposed several matters of defense, the principal being: (1) that the payments made to the strikers by the Union under the so-called "loan agreements" should not be categorized as strike benefits because the relationship was employer and employee, and thus that the strikers had lost no back pay during the period of the strike; (2) that if the payments were not wages rather than strike benefits, that various of the strikers at various times had taken themselves out of the labor market by failure to make adequate job searches or refusing to accept equivalent employment elsewhere during the period of the strike from May, 1963, ending July 31, 1966, and that since the strikers were receiving the equivalent of take-home pay they had no incentive to make job searches.

The Trial Examiner held that until the Union notified the strikers that it was incumbent upon them to make valid job searches quite some time after the strike had started, none had done so, so he disallowed back pay for some of the earlier quarters, but "wilful and contumacious" again reared its ugly head and, in general, he ruled against Podeschi. The Trial Examiner held that the offers had been given "wilfully and contumaciously" and "with

knowledge" that the court decree was being violated, was *res judicata,* and anyway he said they weren't given sufficient time to respond.[5] There wasn't a scintilla of evidence and nobody, the Board, the union or the employees had ever claimed that they were not given sufficient time, nor was it ever contended that they elected to continue their strike because of the staggered nature of the offers. Indeed, this was found as a fact by the Master, the court and the Examiner. The strikers were interrogated in the Master's hearing and he found that the only basis for their refusal was that they had agreed to go back only in a body, whole hog or none. The Trial Examiner's decision was handed down on June 16, 1969.

Shortly thereafter, the Board handed down two decisions on the 28th day of October, 1969, completely changing the law applicable to reinstatement offers made on a staggered basis, specifically reversing the decisions upon which the Board and the Trial Examiner had relied. *Southwestern Pipe Inc.,* 179 NLRB 364 (1969); *O'Daniel Oldsmobile Inc.,* 179 NLRB 398 (1969). These cases held that in an Unfair Labor Practice strike, there is a wide difference between a striker's right to reinstatement and a striker's right to back pay.

In *Southwestern Pipe, Inc.,* the employees struck in response to the Employer's bargaining stance, filed unfair labor practice charges, and made an unconditional offer to return to work. The Employer, having denied the commission of unfair labor practices, refused to offer immediate reinstatement to all and entered upon a course of offering

5. In this regard See *NLRB* v. *Betts Baking Co.,* 428 F. 2d 156 (10th Cir. 1970) and *Harrah's Club,* 403 F. 2d 865 (1968). wherein the courts rejected similar contentions and stated that the question is not how long the employees were given to report, but (1) what effect this time period had on the employees and (2) what affirmative action each employee took if he considered the time limit unreasonable.

reinstatement to only those strikers for whom strike replacements had not been hired. Of the 116 strikers who had offered to return, the Employer "from time to time offered jobs to small numbers of strikers * * *" until a total of 57 had received such offers. These strikers refused reinstatement "until such time as all strikers were offered reinstatement." The Employer was adjudged guilty by the Trial Examiner, who held that the employees were entitled to back pay. The Board reversed the Trial Examiner and said:

> "We have reconsidered the Board's decision in the Abbott and Rice Lake Creamery cases and conclude * * * that those decisions should be reversed to the extent they hold that the failure of an employer to offer strikers group reinstatement subjects that employer to back pay liability as to those employees who have been offered and who have refused reinstatement * * *"
>
> "A striker may refuse an offer of reinstatement without losing his status as a striker, because the employer has not made a similar offer to other strikers who are also entitled to immediate reinstatement. The striker is thereby engaging in protected concerted activity. But he cannot elect to continue his strike, regardless of his motive, and simultaneously demand that the employer pay him for not working."
>
> "As indicated above, however, employees do not lose their right of reinstatement by engaging in a continued strike to protest their employer's failure to offer reinstatement to other strikers * * *"
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> • • • • •
>
> "Consequently we find, contrary to the Trial Examiner that the Respondent's liability for back pay to those strikers who refused its offer of reinstatement at Southwestern Pipe in their former or substantially equivalent jobs, was tolled by such offers."

On the same day that *Southwestern Pipe, Inc.* was issued, the Board decided a similar question in *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398 (1969). In that case 25 of the 34 bargaining unit employees struck in protest of the employer's bargaining tactics. Six days later, the employees called off the strike and reported for work. They were denied admission on the grounds that they could not be allowed to return until the union reduced its demands. The employer, however, did not lock out its non-striking employees. One month later, the employer offered reinstatement to 16 of the 25 strikers; none of whom accepted. The offers required the employees to report for work in three days, which period was not held by either the Examiner or Board to vitiate the offers.

The Examiner ruled that the offer of April 5 did not toll back pay inasmuch as 23 employees were found to be entitled to reinstatement as of that date. In so holding, the Examiner, like the Examiner here, relied upon *Rice Lake Creamery*, 151 NLRB 1113 (1965). The Board again reversed its Trial Examiner. The Board found that the principles of reinstatement and tolling of back pay applicable to strikers are also applicable to employees who have been locked out. The Board concluded that under the principles of *Southwestern Pipe, Inc.* the precedents relied upon by the Examiner were no longer valid and that back pay tolled as of the date of the offer to less than the full group of strikers.

When the instant case got before the Board, it held that *Southwestern Pipe* and *O'Daniel Oldsmobile* were inapplicable because of Podeschi's albatross that "a court has found that Respondent made such staggered offers of reinstatement wilfully and contumaciously with knowledge that they were not in compliance with the Board's court approved Order." Consequently, the Board affirmed the Trial Examiner (there are subissues discussed in the

opinions, i.e., that Podeschi didn't make offers to two of the strikers erroneously thinking that they had quit, as to whom back pay liability is admitted; and a differentiation between twelve strikers who were named in the contempt proceedings and eight who were not, but this differentiation becomes moot if Podeschi is entitled to the rule of *Southwestern Pipe* and *O'Daniel Oldsmobile*, because both groups received the offers of September 20-October 3, 1963).

In its affirmance of the Trial Examiner, the Board made no mention of the defenses that the union had, in effect, paid wages rather than strike benefits to the strikers (some of whom were paid by the union to walk an illegal picket line at Podeschi's Mattoon store, which was in no way involved in the proceedings;) or of the question of job searches and withdrawal from the labor market; or of the question of interest on back pay. It was content to approve the Trial Examiner carte blanche, depriving Podeschi of *Southwestern Pipe* and *O'Daniel Oldsmobile* via the "*wilfully and contumaciously with knowledge* * * * " route. Podeschi advised the St. Louis Regional Office that he desired to appeal the Board's ruling as soon as that office had made the additional back pay computations ordered by the Board and it believed that these amounts were small and probably could be stipulated without further proceedings. No response was received and the next he learned was that the Board had filed an enforcement proceeding in the United States Court of Appeals for the Seventh Circuit. The court affirmed the Trial Examiner and the Board in all respects, excepting as to the Board's claim for interest on the back pay which, the court held would be inequitable, inasmuch as the strikers had received the equivalent of their take home pay and, thus, had not lost the use of the monies. The court said that *Southwestern Pipe* and *O'Daniel Oldsmobile* were not applicable, again

because of the same old albatross, alleged but not proven bad faith on the part of Podeschi.

The court's reasoning in this regard is entirely misguided.

In both *Southwestern Pipe* and *O'Daniel Oldsmobile,* the Board found the unfair labor practices committed by the employer involved to be widespread. A reading of the decision in *Southwestern Pipe* shows findings of racial discrimination, intimidating communications from management, threats by management that the company never would execute a contract with the union, and threats that it would close its doors or move out its machinery before it would have a union in the plant. There is moreover a specific finding that the staggered offers of reinstatement were discriminatory and in themselves violated Sections 8(a)(1) and (3) of the Act.

In the face of all this, in the instant case the Court undertook to distinguish *Southwestern Pipe* because "the employer's refusal to reinstate some of the strikers [in *Southwestern Pipe*] was based on the good faith but erroneous opinion that they were economic rather than unfair labor practice strikers." In the face of the Trial Examiner's findings which were approved by the Board in that case, such an explanation is clearly fallacious. The absurdity of the decision is heightened by the fact that in the instant case the Petitioner offered to reinstate its striking employees at a time when there had been no finding that it was guilty of any unfair labor practice. Furthermore, the Master in Chancery of the Court of Appeals found that the offers were made in good faith.

The Court's attempts to distinguish *O'Daniel Oldsmobile* are equally fallacious. The Court attempts to distinguish *O'Daniel* on the ground that the employer's offer of reinstatement "was based on a general agreement with the union to replace the strikers as vacancies occurred." This

argument was made in that case, but summarily rejected by the Board in these words: "The short answer to . . . this argument is that respondent did not honor its own agreement. . . ." In addition the Board found, "there is not only abundant evidence of anti-union animus, but also obvious disparate treatment of employees."[6]

It is obvious, therefore, that the Court was under a complete misapprehension as to the holdings in *Southwestern Pipe* and *O'Daniel.*

The crux of the Court's decision is that the Petitioner's offers of reinstatement were made wilfully and contumaciously with knowledge that they were not in compliance with the Court's original order. Think about it! When Podeschi made the offers of September 20-October 3, he did so wilfully and contumaciously with knowledge that they were not going to be in compliance with a future Order of the Board and the court! The court has found him guilty of clairvoyance!

Furthermore, to add to the travesty, the court entered two Orders on October 18, 1972, a "conventional one" (See Exhibit F) and, curiously enough (to put it mildly), another Order for civil contempt! (See Exhibit G) Podeschi, who had been meek as a mouse through all these years, is bludgeoned again because he "wilfully and contumaciously" made some offers in 1963, then and there well knowing that they would be in defiance of a Board and Court Order, which would be entered against him a year and a half later! There have been no charges by *anyone* of any anti-union "animus" or misconduct on his part since the decision of the Trial Examiner in 1963, thereafter approved by the Board and the court.

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6. It should also be noted that the Board found nothing illegal in *O'Daniel* about the fact that employees were given only three days to report to work. In the instant case employees were given between two to five days to merely indicate to the petitioner what their intentions were.

Furthermore, and as if to cap the climax, upon a motion (not opposed by the Union or the Board) supported by a *performance bond,* the court refused to grant him an extension of time in which to file this Petition for Certiorari. Is it any wonder, Your Honors, that he feels that he has had a raw deal from the government which has hitherto been so good to him?

CONCLUSION.

It is respectfully submitted, and with all due deference, that when a court says that white is black, it is not *res judicata* or that it is, in fact, black and unassailable.

The country lawyer, who has prepared this (his first) Petition for Certiorari, is aware of the tremendous work load of this honorable court but he earnestly believes that there is a miscarriage here, which he respectfully and humbly submits should be rectified and therefore requests that this Petition for Certiorari be granted and that Podeschi be held entitled to the rule of *Southwestern Pipe* and *O'Daniel Oldsmobile.*

Respectfully submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 23, 1968

Before

HON. LATHAM CASTLE, *Circuit Judge*

HON. ROGER J. KILEY, *Circuit Judge*

HON. LUTHER M. SWYGERT, *Circuit Judge*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

No. 14770 *vs.*

MY STORE, INC.,
Respondent.

ORDER

On July 6, 1965, this court filed its opinion in the above cause, enforcing the National Labor Relations Board's order finding that My Store, Inc., Respondent, had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U. S. C. 151, et seq. The Supreme Court denied certiorari. On October 20, 1966, the Board filed

a petition in this court for adjudication that My Store, Inc., and its President, Pasquo Podeschi, were in civil contempt for failure to comply with this court's Decree by their refusal and failure to reinstate or make valid offers of reinstatement to twelve employees. On October 25, 1966, My Store, Inc., and Podeschi were ordered to show cause. They answered the Board's petition and the Board filed its reply.

On December 22, 1966, this court determined that it was appropriate to refer to a Special Master the following issues of fact and law:

> (1) Whether prior to the decree of July 6, 1965, to-wit, in September and October 1963, My Store, Inc. had made *bona fide* and valid offers of reinstatement to the unfair labor practice strikers, other than Arlin Farthing and Kenneth W. Reed, entitled to such offers under the decree and (2) whether My Store, Inc. was justified in failing to make any offers of reinstatement to Arlin Farthing and Kenneth W. Reed.

The Master filed his Report, Findings of Fact, Conclusions of Law and Recommendations with the Clerk on November 2, 1967. The Master concluded that Respondent had made bona fide and valid offers of reinstatement to all but two of the striking employees; that under this court's decision in *NLRB* v. *Abbott*, 331 F. 2d 209, Respondent was justified in making the offers on a staggered basis instead of to the strikers as a group; and Respondent was justified in failing to offer reinstatement to the two men to whom offers were not made. The conclusions rested on findings that the offers of reinstatement were made for the same jobs, hours of work and rates of pay; that all offers were rejected because the offers were staggered instead of being made to the strikers as a group but that Respondent staggered the offers not to discriminate unlawfully but according to good business practice; and that the employees had never, during the

pertinent period, met as a group to discuss or reject the individual offers nor was a "collective refusal" of the offers given to Respondent. The Master found justification for not offering reinstatement to the two employees because one had not actually joined the strike and the other had entered the army after the strike began.

The Board filed Exceptions to the Report together with a supporting brief, and Respondent filed a brief in opposition.

The court has considered the Report, Exceptions and brief, and has in conference voted to sustain the Board's Exceptions and to reject the Report of the Special Master. The court finds that the question of Respondent's motive in offering to the strikers in an unfair practices strike reinstatement on a staggered basis, instead of as a group to the twelve employees involved, should have been, and was not considered in the light of this Court's original opinion, *NLRB* v. *My Store, Inc.*, 345 F. 2d 494 (7th Cir. 1965), and the facts therein upon which the court noted Respondent's "animosity" toward the Union. In that light we think the Master's ultimate findings of fact justifying the staggered basis for the offers of reinstatement are clearly erroneous, and that the conclusions resting thereon must be rejected. In our view, under the circumstances pointed out in our opinion, once the Master was shown the manner in which the offers were made, Respondent had the burden of going forward to justify the "practice." Respondent failed to do so. This court's opinion in *Abbott* does not militate against our decision, since the issue here is not whether staggered offers of reinstatement made to economic strikers whose employer has exhibited no anti-union animus are per se invalid.

We hold that the offers of reinstatement made by Respondent were not valid and that the offers were made

willfully and contumaciously this court entered July 6, 1965.

We adjudge Respondent My Store, Inc., in civil contempt of this court. We also adjudge Pasquo Podeschi in civil contempt, since he is admittedly President and Chief Executive Officer of the Respondent, since he has had knowledge of this court's order and the power to see that Respondent complied with it, and since he instead has aided and abetted Respondent's refusal to comply.

IT IS ORDERED that attachment issue directed to the United States Marshal for the Southern District of Illinois, commanding him to arrest Pasquo Podeschi, President of My Store, Inc., and commit him to the custody of the Attorney General of the United States, PROVIDED, however, that if the said Pasquo Podeschi causes Respondent to comply with the Board's order enforced by this court's Decree of July 6, 1965, in all respects, then said Pasquo Podeschi will have purged himself of contempt of this court and the writ of attachment shall abate.

Inasmuch as there are no objections to the amounts of the Special Master's fees and expenses, the court approves the Master's fees of $8,000.00 and expenses of $293.64. The parties have previously agreed to share the costs of reference equally.

A True Copy:

Teste:

/s/ KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

EXHIBIT B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 22, 1968

Before

HON. LATHAM CASTLE, *Circuit Judge*

HON. ROGER J. KILEY, *Circuit Judge*

HON. LUTHER M. SWYGERT, *Circuit Judge*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

No. 14770 *vs.*

MY STORE, INC.,
Respondent.

ORDER

IT IS ORDERED that this court's order of February 23, 1968, adjudging Pasquo Podeschi in civil contempt of this court, be modified to read as follows:

On July 6, 1965, this court filed its opinion in the above cause, enforcing the National Labor Relations Board's order finding that My Store, Inc., Respondent, had violated

Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U. S. C. 151, et seq. The Supreme Court denied certiorari. On October 20, 1966, the Board filed a petition in this court for adjudication that My Store, Inc., and its President, Pasquo Podeschi, were in civil contempt for failure to comply with this court's Decree by their refusal and failure to reinstate or make valid offers of reinstatement to twelve employees. On October 25, 1966, My Store, Inc., and Podeschi were ordered to show cause. They answered the Board's petition and the Board filed its reply.

On December 22, 1966, this court determined that it was appropriate to refer to a Special Master the following issues of fact and law:

> (1) Whether prior to the decree of July 6, 1965, to-wit, in September and October 1963, My Store, Inc. had made *bona fide* and valid offers of reinstatement to the unfair labor practice strikers, other than Arlin Farthing and Kenneth W. Reed, entitled to such offers under the decree and (2) whether My Store, Inc. was justified in failing to make any offers of reinstatement to Arlin Farthing and Kenneth W. Reed.

The Master filed his Report, Findings of Fact, Conclusions of Law and Recommendations with the Clerk on November 2, 1967. The Master concluded that Respondent had made bona fide and valid offers of reinstatement to all but two of the striking employees; that under this court's decision in *NLRB* v. *Abbott*, 331 F. 2d 209, Respondent was justified in making the offers on a staggered basis instead of to the strikers as a group; and Respondent was justified in failing to offer reinstatement to the two men to whom offers were not made. The conclusions rested on findings that the offers of reinstatement were made for the same jobs, hours of work and rates of pay; that all offers were rejected because the offers were staggered instead of being made to the strikers as a group but that

Respondent staggered the offers not to discriminate unlawfully but according to good business practice; and that the employees had never, during the pertinent period, met as a group to discuss or reject the individual offers nor was a "collective refusal" of the offers given to Respondent. The Master found justification for not offering reinstatement to the two employees because one had not actually joined the strike and the other had entered the army after the strike began.

The Board filed Exceptions to the Report together with a supporting brief, and Respondent filed a brief in opposition.

The court has considered the Report, Exceptions and brief, and has in conference voted to sustain the Board's Exceptions and to reject the Report of the Special Master. The court finds that the question of Respondent's motive in offering to the strikers in an unfair practices strike reinstatement on a staggered basis, instead of as a group to the twelve employees involved, should have been, and was not, considered in the light of this court's original opinion, *NLRB* v. *My Store, Inc.*, 345 F. 2d 494 (7th Cir. 1965), and the facts therein upon which the court noted Respondent's "animosity" toward the Union. In that light we think the Master's ultimate findings of fact justifying the staggered basis for the offers of reinstatement are clearly erroneous, and that the conclusions resting thereon must be rejected. In our view, under the circumstances pointed out in our opinion, once the Master was shown the manner in which the offers were made, Respondent had the burden of going forward to justify the "practice." Respondent failed to do so. This court's opinion in *Abbott* does not militate against our decision, since the issue here is not whether staggered offers of reinstatement made to economic strikers whose employer has exhibited no anti-union animus are per se invalid.

We hold that the offers of reinstatement made by Respondent were not valid and that the offers were made wilfully and contumaciously with knowledge that they were not in compliance with the Board's order of May 25, 1964, enforced by the Decree of this court entered July 6, 1965.

We adjudge Respondent My Store, Inc., in civil contempt of this court. We also adjudge Pasquo Podeschi in civil contempt, since he is admittedly President and Chief Executive Officer of the Respondent, since he has had knowledge of this court's order and the power to see that Respondent complied with it, and since he instead has aided and abetted Respondent's refusal to comply.

IT IS ORDERED that if Pasquo Podeschi has not caused respondent to comply with the Board's order, enforced by this court's decree of July 6, 1965, within ten days from April 22, 1968, by making bona fide and valid offers to Harold E. Banfield, Mrs. Carolyn Fleming, Robert L. Kearney, Delores M. Reed, Frank J. Sartore, Jr., Joseph Sadlecek, Charles A. Shanks, Donald Spindel, James Waterman, William Wiggs, Arlin Farthing, and Kenneth W. Reed; attachment issue directed to the United States Marshal for the Southern District of Illinois, commanding him to arrest Pasquo Podeschi, President of My Store, Inc., and commit him to the custody of the Attorney General of the United States; PROVIDED, however, that if the said Pasquo Podeschi causes Respondent to comply with the Board's order, enforced by this court's Decree of July 6, 1965, either before or after attachment has issued, by making bona fide and valid offers to Harold E. Banfield, Mrs. Carolyn Fleming, Robert L. Kearney, Delores M. Reed, Frank J. Sartore, Jr., Joseph Sadlecek, Charles A. Shanks, Donald Spindel, James Waterman, William Wiggs, Arlin Farthing, and Kenneth W. Reed; then said Pasquo Podeschi will have purged himself of contempt of this court and the writ of attachment shall abate.

Inasmuch as there are no objections to the amounts of the Special Master's fees and expenses, the court approves the Master's fees of $8,000.00 and expenses of $293.64. The parties have previously agreed to share the costs of reference equally.

/s/ LATHAM CASTLE,
Latham Castle,
Circuit Judge.

/s/ ROGER J. KILEY,
Roger J. Kiley,
Circuit Judge.

/s/ LUTHER M. SWYGERT,
Luther M. Swygert,
Circuit Judge.

A true copy, teste:

/s/ KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

EXHIBIT C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Friday, June 14, 1968

Before

HON. LATHAM CASTLE, *Chief Judge*

HON. ROGER J. KILEY, *Circuit Judge*

HON. LUTHER M. SWYGERT, *Circuit Judge*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

No. 14770 *vs.*

MY STORE, INC.,
Respondent.

ORDER

This court, having by order of April 22, 1968, found and adjudged respondent, My Store, Inc., and its president and chief executive officer, Pasquo Podeschi, in civil contempt of this court's decree of July 6, 1965, and directed that Pasquo Podeschi purge said contempt by causing respondent My Store, Inc., to make bona fide and valid offers

of reinstatement to Harold E. Banfield, Mrs. Carolyn Fleming Anderson, Robert L. Kearney, Delores M. Reed, Frank J. Sartore, Jr., Joseph Sedlecek, Charles A. Shanks, Donald Spindel, James Waterman, William Wiggs, Arlin Farthing, and Kenneth W. Reed; and respondent having shown the court that Pasquo Podeschi did cause My Store, Inc., to purge itself of the contempt as directed, it is upon all the proceedings herein,

ADJUDGED that respondents My Store, Inc., and Pasquo Podeschi have satisfied the terms of purgation contained in the order of April 22, 1968, and IT IS ORDERED that the writ of attachment against Pasquo Podeschi shall abate.

IT IS FURTHER ORDERED that the proposed Adjudication and Order on Civil Contempt filed by the Board in this court on May 27, 1968, be and it is hereby rejected at this time.

IT IS FURTHER ORDERED that the cause be remanded to the Board for further proceedings to determine (a) what specific sums in back pay are due what employees of My Store, Inc., named in the April 22, 1968, contempt order; (b) what amount of out of pocket expenses is due the Board which My Store, Inc., has, upon demand, refused to pay to the Board; and (c) after determining (a) and (b), what appropriate notices should My Store be ordered to post and maintain.

IT IS FURTHER ORDERED that this court reserve jurisdiction for further appropriate proceedings in this cause.

A true copy, teste:

/s/ KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

By /s/ H. K. MCCORMACK,
Deputy Clerk.

EXHIBIT D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MY STORE, INC. and UNITED RETAIL WORKERS UNION (INDEPENDENT)	Case 14-CA-3050

SUPPLEMENTAL DECISION AND ORDER

On May 25, 1964, the National Labor Relations Board issued a Decision and Order in the above-entitled case[1] in which it found that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. The Board's Order directed Respondent, *inter alia,* to offer to the unfair labor practice strikers who made unconditional requests for reinstatement, immediate and full reinstatement to their former or substantially equivalent positions, and to make them whole for loss of pay resulting from the failure to reinstate the unfair labor strikers on request. Thereafter, the Board's Order was enforced in full by the United States Court of Appeals for the Seventh Circuit, including its reinstatement and backpay provisions.[2] Subsequently, Respondent's petition to the Supreme Court of the United States for a writ of certiorari was denied by the Court.[3]

1. 147 NLRB 145.
2. 345 F. 2d 494 (C. A. 7).
3. 382 U. S. 927.

Upon a petition filed by the Board on October 17, 1966, the Seventh Circuit Court of Appeals, on April 22, 1968, adjudged Respondent and its President, Pasquo Podeschi, in civil contempt for making invalid offers of reinstatement "willfully and contumaciously with knowledge that they were not in compliance with the Board's order . . . enforced by the Decree of this court. . . ."[4] Thereafter, on June 14, 1968, the Court adjudged that the terms of purgation contained in the April 22 order were satisfied and remanded the case to the Board to determine "what specific sums in backpay are due what employees" of Respondent.[5]

Pursuant to a backpay specification and appropriate notice issued by the Regional Director for Region 14, a hearing was held before Trial Examiner John M. Dyer for the purpose of determining the amounts of backpay due to the discriminatees. On June 17, 1969, the Trial Examiner issued his Supplemental Decision, which is attached hereto, in which he awarded specific amounts of backpay to 20 discriminatees. Thereafter, Respondent filed exceptions to the Trial Examiner's Supplemental Decision and a supporting brief. The General Counsel filed cross-exceptions to parts of the Supplemental Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, includ-

4. ..... F. 2d ..... (C. A. 7).

5. ..... F. 2d ..... (C. A. 7).

ing the Supplemental Decision, and the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith.

1. We agree with the Trial Examiner that the question of the validity of Respondent's offers of reinstatement is *res judicata*. Despite the Board's court-approved order that Respondent reinstate those unfair labor practice strikers who had made unconditional offers to return to work on July 11, 1963, discharging replacements, if necessary, Respondent made offers to the approximately 20 strikers on a staggered basis, to no more than three employees at a time, while retaining eight replacement employees, during the September-October 1963 period. Thereafter, the Board petitioned the Court for adjudication of Respondent in civil contempt, maintaining that the offers to all strikers were invalid. The Court, as noted above, specifically found that the offers were invalid and made "willfully and contumaciously with knowledge that they were not in compliance" with the Board's order.

Respondent was only required to make new, valid offers of reinstatement to 12 strikers, which it did in purgation of the civil contempt adjudication, since the Board had informed the Court that it wished to consider herein the status of the remaining discriminatees in light of the holding in *N. L. R. B.* v. *Rice Lake Creamery Co.*, 365 F. 2d 888 (C. A. D. C.). While the question of the validity of Respondent's offers of reinstatement is *res judicata*, in any event, we agree with the Trial Examiner that the offers were invalid as not giving the discriminatees adequate time within which to respond. See, *e.g.*, *Betts Baking Company*, 173 NLRB No. 157; *Harrah's Club*, 158 NLRB 758; *Thermoid Company*, 90 NLRB 614. Therefore, since it is apparent that Respondent was not mislead by the strikers' responses to the offers, we adopt the Trial Examiner's treatment of the

reinstatement and backpay rights of the eight employees whose status he determined in light of the holding in *Rice Lake*.

Subsequent to the Trial Examiner's Supplemental Decision herein, the Board, in *Southwestern Pipe, Inc.*, 179 NLRB No. 52, reversed prior law and held, in the language of a companion case, *O'Daniel Oldsmobile, Inc.*, 179 NLRB No. 55, that "where striking employees make an unconditional offer to return to work and the employer *without a discriminatory motive*, offers reinstatement to them as less than a group, backpay is tolled as to those strikers who receive offers of reinstatement but refuse then to return to work." [Emphasis Supplied.] In light of those decisions, we granted Respondent's motion for permission to file a supplemental brief herein, since several of the strikers had refused Respondent's piecemeal offers of reinstatement, asserting their desire to return as a group. For the following reasons, we do not agree with Respondent's contention that backpay liability must be tolled as of the date each refused its seriatim offers of reinstatement in September-October 1963.

Since the Court herein specifically found that Respondent's *motive* in offering reinstatement on a staggered basis, as indicated by its "animosity" to the Union, militated against a finding that such offers were valid, it seems clear that backpay cannot be tolled, even though several discriminatees insisted on returning as a group. Not only does the rule set forth in *Southwestern Pipe* and *O'Daniel*

2. We adopt the Trial Examiner's findings and determinations of backpay due the following discriminatees except where modified herein:

Carolyn (Fleming) Anderson	$ 1,564.51
Harold E. Banfield	13,834.71
James Michael Cooper	1,760.27
Arlin Farthing	5,974.60
Bernice Garmon	6,891.37
William A. Ginger	343.30
Robert L. Kearney	8,432.48
James W. Lindsey	0.00
Richard E. Mahan	1,002.67
Joseph Niewinski	7,380.16
Delores M. Reed	6,899.90
Kenneth W. Reed	573.16
William J. Rhymes	480.95
Frank J. Sartore, Jr.	11,494.76
Lonnie J. Sartore	270.99
Joseph Sedlacek, Jr.	5,012.01
Charles A. Shanks[6]	4,589.79
Lorraine Smith[7]	4,782.84
Donald E. Spindel	3,582.75
Florence Walker[8]	2,575.97
James M. Waterman	0.00
Billy L. Wiggs	9,571.55

6. The Trial Examiner concluded that Shanks did not take himself out of the labor market for 12 weeks during the first quarter of 1965 when he attended a welders school run by the Illinois State Employment Service. We disagree and hold that Shanks is only entitled to 1 week of backpay for the first quarter of 1965. The award as stated reflects this correction.

7. While concluding that Smith was entitled to this amount plus interest, the Trial Examiner, in Appendix Q, inadvertently wrote "less interest". We correct this obvious oversight so that page iii of Appendix Q reads "Total to June 30, plus interest".

8. The Trial Examiner concluded that Walker was entitled to full backpay for the first and second quarters of 1966, less interim earnings, if any. However, since Walker testified that her doctor told her she could only work half a day until the fall of 1966, we shall reduce the backpay for those quarters to reflect this limitation. Therefore, the net backpay for the first and second quarters of 1966, in Appendix S, shall read $391.30 for each quarter and the total net backpay, as noted above, $2,575.97. As in the case of Smith, the Trial Examiner inadvertently wrote "less interest" after the total rather than "plus interest" in conformity with the Board's long-established rule.

ORDER

On the basis of the foregoing Supplemental Decision and Order and the entire record in this case, the National Labor Relations Board hereby orders that Respondent, My Store, Inc., Taylorville, Illinois, its officers, agents, successors, and assigns, shall pay to the employees involved in this proceeding as net backpay the amounts awarded to them in this Supplemental Decision and Order. It is further ordered that the rights to reinstatement and backpay of certain employees as set forth herein be reserved for periods beyond the scope of this Supplemental Decision and Order.

Dated, Washington, D. C., Feb. 27, 1970.

FRANK W. MCCULLOCH
Chairman

JOHN H. FANNING
Member

HOWARD JENKINS, JR.
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL.)

Member Jenkins, concurring:

For the reasons expressed in my dissent in *Southwestern Pipe, Inc.*, 179 NLRB No. 52, I concur in the result herein.

Dated, Washington, D. C., Feb. 27, 1970.

HOWARD JENKINS, JR.
Member

NATIONAL LABOR RELATIONS BOARD

EXHIBIT E

Appendix _____

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

September Term, 1971 April Session, 1972

No. 71-1491

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
vs.
MY STORE, INC., *Respondent*.

On Application for Enforcement of a Supplemental Decision and Order of the National Labor Relations Board.

Argued May 25, 1972—Decided September 14, 1972

Before Mr. Justice CLARK[1], SWYGERT, *Chief Judge*, and STEVENS, *Circuit Judge*.

SWYGERT, *Chief Judge*. The National Labor Relations Board petitions for the enforcement of its supplemental order issued against respondent My Store, Inc. on February 7, 1970.[2] The order requires that respondent pay

1. The Honorable Tom C. Clark, Associate Justice of the United States Supreme Court (Retired), is sitting by designation.

2. The Board's supplemental decision and order are reported at 181 N. L. R. B. 47 (1970).

twenty of its employees specified amounts with interest as backpay flowing from unfair labor practices which had been engaged in by the respondent.

A brief history of the case will be undertaken. Pasquo Podeschi is president and the operating head of My Store, Inc., a supermarket in Taylorville, Illinois. Organization of the company's employees by the United Retail Workers Union (Independent) began in December 1962. Following the filing of an NLRB petition, an election was held in February 1963; the union won. Shortly thereafter, the parties began negotiating for a contract, but only after the union had filed and then dismissed various unfair labor charges against the employer. On May 2, 1963 the union struck respondent and on May 8 filed the charges on which these proceedings are based. On December 9, 1963 a trial examiner found that My Store had violated sections 8(a)(1), (3) and (5) of the National Labor Relations Act. The Board affirmed the trial examiner on May 25, 1964. The Board found *inter alia* that the company had discriminatorily cut the hours of employment of certain union adherents, that the strike had been motivated by the company's unfair labor practices, and that the company had unlawfully rejected the union's unconditional request of July 11, 1963 that the strikers be reinstated. As part of the remedy the Board ordered the company to offer those strikers who had made unconditional requests to return, full and immediate reinstatement to their former or substantially equivalent positions, and to compensate them for any loss of pay as a result of the company's unfair labor practices. On April 7, 1965 this court enforced the Board's order in full. *NLRB* v. *My Store, Inc.*, 345 F. 2d 494 (7th Cir.), *cert. denied*, 382 U. S. 927 (1965).

On October 17, 1966 the Board filed a petition with this court asking that the company and its president be adjudged in civil contempt for willfully failing to offer the

strikers reinstatement as required by the court's decree. The company defended on the ground that it had made offers of reinstatement to the twenty strikers in September and October 1963; the Board responded that the offers were invalid.[3] On April 22, 1968 this court adjudged the company and its president in civil contempt as to twelve strikers, on the grounds that the offers of reinstatement "were not valid and were made willfully and with knowledge that they were not in compliance with the decree of this court."

The company thereafter made offers of reinstatement to the twelve strikers, and this court on June 14, 1968, having determined that the purgative terms of its contempt order had been satisfied by the company's offers, remanded the case to the Board to determine "what specific sums in backpay are due what employees" of the company.

Pursuant to a backpay specification and appropriate notice, a hearing was held to determine (1) whether the strikers not included in the contempt litigation had forfeited their rights to reinstatement, (2) the specific amounts of backpay due to all the strikers, and (3) the amounts of backpay due to two nonstrikers who had suffered discriminatory wage reductions. The specification alleged that the backpay period for most of the twenty strikers ran from various periods in 1963 until June 30, 1968, by which time the company had made reinstatement offers to twelve of the strikers. As to the other eight strikers not included in the contempt adjudication, the specification alleged that their backpay period would continue to run until the company made adequate offers of reinstatement to them. At the conclusion of the hearing the examiner recommended backpay awards to twenty of the discriminatees, the respec-

3. As to eight of the twenty strikers, however, the Board requested that it be permitted to investigate further, in order to determine whether these strikers had, by their responses to the offers, forfeited their rights to reinstatement.

tive awards being based on the difference between each discriminatee's loss of pay due to the company's unfair labor practices and his interim earnings from other employment.

The Board on the basis of the proceedings before the examiner determined that as of June 30, 1968, the discriminatees were entitled to various sums with interest. The total award was approximately $97,000. The Board further determined that seven of the eight discriminatees who were not included in the contempt proceedings had not forfeited their rights to reinstatement by their responses to the company's invalid reinstatement offers, and that since as of June 30, 1968, they had not received valid offers of reinstatement, their backpay period would continue to run until they either removed themselves from the labor market or received valid offers of reinstatement.

I

In reviewing the Board's supplemental order, we are constrained to follow the Supreme Court's recent pronouncement pertaining to the Board's authority over the backpay remedy:

> We start with the broad command of Section 10(c) of the National Labor Relations Act, 29 U. S. C. Section 160(c), that upon finding that an unfair labor practice has been committed the Board shall order the violater "to take such affirmative action, including reinstatement with or without backpay, as will effectuate the policies" of the Act. This Court has stated that the remedial power of the Board is "a broad discretionary one, subject to limited judicial review." *Fibreboard Corp* v. *N. L. R. B.*, 397 U. S. 203, 216 (1964). . . . As with the Board's other remedies, the power to order backpay "is for the Board to wield, not for the courts." *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346 (1953). "When the Board 'in

> the exercise of its informed discretion,' makes an order of restoration by way of backpay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *Id.* at 346-347.

One of the defenses interposed by the respondent relates to the union's payment to the strikers during the strike of amounts equal to the wages they would have received from the company had they been working. According to the trial examiner's findings, the union's National Executive Director met with the employees a few days prior to the strike and informed them that if they decided to strike in response to the company's unfair labor practices, the union would advance them loans equivalent to their net wages to be repaid when the company was found to be in violation of the Act and ordered to make restitution. The employees decided to strike under those conditions, agreed to the loan proposal, and later signed formal loan agreements.

During the strike the strikers received weekly checks from the union equal in amount to their net take-home pay. This practice was continued even when the strikers were unable to picket because of illness or job searches. The strikers, however, received none of the usual benefits afforded union employees such as hospitalization and fringe benefits. The examiner concluded: "The Union considered the discriminatees essentially as locked-out strikers who were receiving strike benefits which would eventually be repaid to the Union, and not as its employees."

Because of an administrative inadvertence, the union initially treated these payments as income for tax purposes, and accordingly made social security and tax payments on behalf of the strikers. At the end of 1963, when the error was discovered, the union filed amended tax forms and received credit for the sums erroneously reported.

Besides receiving their net take-home pay from the union, two strikers, Frank Sartore, Jr. and Harold Banfield, each received $15.00 per week for additional work on the picket line. These amounts were treated as income by the union for tax purposes and were deducted as interim earnings from the backpay awarded these two strikers.

The company argues that because of the money received by the union, the strikers sustained no loss in wages during the period for which the backpay awards were granted. The argument must be rejected. Under the arrangement with the union, the sums received by the strikers, except for the additional amounts paid Sartore and Banfield for picket line duties, were not earned income. The strikers were required to repay the amounts received as "loans" when the company honored its backpay obligations to them. Moreover, even if there had been no obligation to reimburse the union, the payments would still qualify as collateral strike benefits and exempt as interim earnings unless received as a condition precedent to, or in compensation for, picketing or other services. *Golay & Co.* v. *NLRB*, ... F. 2d ..... (7th Cir. 1971). *Cf. NLRB* v. *Gullett Gin Co.*, 340 U. S. 361 (1951).

II

The company insists that no backpay may be awarded beyond the date of the staggered offers of reinstatement made during the September-October 1963 period, despite the fact that the invalidity of these offers is no longer in dispute. It argues that under the recent decisions of the Board in *Southwestern Pipe, Inc.*, 179 N. L. R. B. 364 (1969), *O'Daniel Oldsmobile, Inc.*, 179 N. L. R. B. 398 (1969), and *National Business Forms*, 189 N. L. R. B. 136 (1972), the backpay of the strikers should have been tolled as to those strikers who refused the September-October 1963 offers because they wanted to return as a group.

In *O'Daniel Oldsmobile, Inc.* the Board applied *Southwestern Pipe;* interpreting the case as holding that where an employer makes staggered offers of reinstatement in good faith and the strikers refuse them because they wish to return as a group, the offers toll backpay as to those strikers who refuse the offers even though the strikers' right to reinstatement is unaffected. *O'Daniel Oldsmobile, Inc.,* 179 N. L. R. B. at 398 n. 4.

In its decision in the instant proceeding, the Board discussed *Southwestern Pipe* and the two related cases and found them to be inapposite. The Board said:

> Since the Court herein specifically found that Respondent's *motive* in offering reinstatement on a staggered basis, as indicated by its "animosity" to the Union, militated against a finding that such offers were valid, it seems clear that backpay cannot be tolled, even though several discriminatees insisted on returning as a group. Not only does the rule set forth in *Southwestern Pipe* and *O'Daniel Oldsmobile* require the absence of a discriminatory motive, but it is clearly inapplicable to a situation where, as here, a Court has found that Respondent made such staggered offers of reinstatement "willfully and contumaciously with knowledge that they were not in compliance" with the Board's court-approved order.

The company counters that both *Southwestern Pipe* and *O'Daniel Oldsmobile, Inc.* involved employers whose conduct was not only found to be violative of the Act but also reflective of a discriminatory motive and a general anti-union animus. Thus, they maintain, there is no difference between those cases and the instant one. The General Counsel's response to this argument is persuasive. As he points out, while the unfair labor practices found in those cases did mirror on anti-union animus and a discriminatory motive, this did not mean that the specific act, giving staggered offers of reinstatement, also was done in bad faith.

In *Southwestern Pipe* the employer's refusal to reinstate some of the strikers was based on a good faith but erroneous opinion that they were economic rather than unfair labor practice strikers. In *O'Daniel Oldsmobile, Inc.* the employer's offer of reinstatement was based on a general agreement with the union to replace the strikers as vacancies occurred.

Here, there is no question about the company's bad faith in making the staggered offers which required a response within one day, and at most three days, after the offers were mailed. In the contempt proceedings, we had concluded that the company's offers were made "willfully and contumaciously with knowledge that they were not in compliance" with our original order. That finding completely distinguishes this case from *Southwestern Pipe* and *O'Daniel Oldsmobile, Inc.*

III

The company resists enforcement of the supplementary order on the further ground that the strikers willfully incurred a loss of earnings by not making a diligent job search during the backpay periods in question. It argues that the strikers' obligation to mitigate damages by seeking other employment was "undermined" by the union's payment of "full wages" during the strike. In particular, it canvasses the evidence relating to three individual strikers, suggesting that these are typical of the entire group. Based upon its analysis of these cases, it contends that the Board's rulings are erroneous. We do not agree. In the first place, it is settled that the courts will not undertake a de novo review of the Board's backpay computations. *Winn-Dixie Stores, Inc.* v. *NLRB,* 413 F. 2d 1008 (5th Cir. 1969). Secondly, the trial examiner's findings indicate a careful, painstaking evaluation of the evidence relating to each of the discriminatees. Finally, our

examination of the record as a whole convinces us that the examiner's findings, adopted by the Board, are supported by substantial evidence. In these circumstances, it would serve no useful purpose to prolong this opinion by dissecting the bits and pieces of the evidence as to each of the twenty discriminatees.

The company strongly argues that since the strikers received the equivalent of their wages from the union during the strike there was little incentive on the part of these people to seek outside employment. But this is only a permissible inference from the facts. It does not by itself prove that the strikers failed to make a diligent job search. The trial examiner, after reviewing all the evidence, acknowledged that this could have been a factor but concluded: "The fact that some of them may not have searched as diligently for work before the Union ceased making the loans as they did afterwards is an indication of the impelling necessity to obtain employment and does not mean that they were not searching for reasonably equivalent employment prior to that time." We think this conclusion was warranted.[4]

---

4. In *NLRB* v. *The Madison Courier, Inc.*, No. 24,808 (D. C. Cir., filed Aug. 9, 1972), the court observed:

> The application of rigid rules regarding the effect of picketing or receiving union strike benefits during the back pay period on the determination of mitigation doctrine questions has similarly been eschewed. The fact that unfair labor practice strikers received strike benefits does not diminish their right to receive back pay, *providing* they otherwise made reasonable efforts to locate suitable interim employment. Likewise, the fact that such persons engaged in picketing during the back pay period does not automatically negate their right to reimbursement by their employer. However, like the receipt of strike benefits, picket line activity does not relieve the discriminates of the obligation of making reasonable efforts to obtain appropriate interim employment.

We are in agreement with this statement of the law. Moreover, we are satisfied that these are the criteria which were in fact applied by the examiner in the instant proceeding.

Subsequent to oral argument, the company has called our attention to *NLRB* v. *The Madison Courier, Inc.*, No. 24,808, decided by the District of Columbia Circuit on August 9, 1972. We are in general agreement with the views expressed in that case, both in the majority and the concurring opinions, but do not believe its holding requires any modification of our conclusions. In that case, the court looked with disfavor on the Board's considering the backpay claimants as a single group rather than "examining their respective efforts to locate interim employment on an individualized basis." The court concluded: "Such a disposition clearly violated the recognized principle of *treating each particular claimant separately* in determining his right to backpay." This is not the situation here. The trial examiner examined and evaluated the facts peculiar to each claimant. He was discriminating in his disallowance of backpay when the facts warranted that during certain periods the strikers had not made an adequate job search. For example, he disallowed backpay for claimant Harold Banfield for a particular period after the start of the strike because the claimant was more interested in maintaining the picket line than in finding an outside job.[5] Similarly, the examiner after an

5. On this point the examiner said:

Banfield's forms and his testimony indicate to me that from the inception of the strike and particularly after he and F. Sartore starting sharing responsibility for the picketing, through the third quarter of 1964, he was not interested in leaving the picket line for employment elsewhere, but in effect withdrew from the labor market and involved himself solely with the strike. When the Union in the fall of 1964 made it clear to the discriminatees that they had to actively seek employment to be considered in the labor market, Banfield and some others for the first time started to really search for other work. I have concluded from the testimony here and find that Banfield was not in the labor market through the third quarter of 1964, and accordingly determine that his backpay claims for the period from July 11, 1963, through September 30, 1964, should not be allowed.

extensive review of the evidence pertaining to claimant Frank Sartore found that Sartore had taken himself out of the job market for a period of a year and three months after the start of the strike and thus was not entitled to backpay during that time.[6]

IV.

The company's final contention is that since the employees had the benefit of the union loans, no interest should be allowed on their backpay. There is no question that the Board has the authority to allow interest. *Revere Copper & Brass, Inc.* v. *NLRB*, 324 F. 2d 132 (7th Cir. 1963). The fact that strikers received some payment from the union during part of the backpay periods should not in itself disqualify them from receiving *any* interest on the awards. However, interest should not have been allowed on that part of the awards which represents lost wages for the periods when the union advanced loans that were equivalent to the claimants' take-home pay. The loan agreements specifically provided that the loans should bear no interest. Thus, it would be inequitable to require the respondent to pay interest on the sums represented by loans since the claimants themselves suffered no loss of the use of those monies.

The Board's supplemental order as modified will be enforced.

---

6. The examiner stated in part:

> On the basis of these exhibits and his testimony, I have concluded that from the third quarter of 1963 through the third quarter of 1964 Frank Sartore withheld himself from the labor market and continued to engage in and to some extent direct picket line activities. While thus engaged Sartore was receiving his strike benefit loan and the added $15 per week which meant that he had better than $100 per week to support his wife and family of five children.
>
> Since I find that Sartore did not seek employment during that five-quarter period, I further find that he is not entitled to backpay for that period and so strike those five quarters from the backpay specification.

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EXHIBIT F

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 18, 1972

Before

HON. TOM C. CLARK, *Associate Justice**
HON. LUTHER M. SWYGERT, *Chief Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
No. 71-1491 *vs.*
MY STORE, INC.,
Respondent.

JUDGMENT

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of a supplemental order issued by it on February 27, 1970 against My Store, Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on May 25, 1972, and has considered the briefs and transcript of record filed in this cause. On September 14, 1972,

* The Honorable Tom C. Clark, Associate Justice of the United States Supreme Court (Retired) is sitting by designation.

the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's supplemental order, as modified.

On consideration whereof, it is ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that Respondent My Store, Inc., its officers, agents, successors, and assigns shall pay to the employees named below the following amounts:

1.	Carol (Fleming) Anderson	$ 1,564.51
2.	Harold Banfield	13,834.71
3.	James Michael Cooper	1,760,27
4.	Arlin Farthing	5,974.60
5.	Bernice Garmon	5,891.37
6.	William A. Ginger	343.30
7.	Robert Kearney	8,432.48
8.	Richard E. Mahan	1,002.67
9.	Joseph Niewinski	7,380.16
10.	Delores Reed	6,899.90
11.	Kenneth Reed	573.16
12.	William J. Rhymes	480.95
13.	Frank J. Sartore, Jr.	11,494.76
14.	Lonnie J. Sartore	270.99
15.	Joseph Sedlacek, Jr.	5,012.01
16.	Charles A. Shanks	4,589.79
17.	Lorraine Smith	4,782.84
18.	Donald E. Spindel	3,582.75
19.	Florence Walker	2,575.97
20.	Billy L. Wiggs	9,571.55

In addition, respondent shall pay interest on the above amounts at the rate of 6 percent per annum computed on the basis of the quarterly amounts of net backpay due, except that interest shall not be paid on that part of the awards which represents lost wages for the periods when the union advanced loans that were equivalent to the claimants' take-home pay. In addition, respondent shall deduct from the above amounts any tax withholding required by law.

It is further ordered that costs shall be taxed against the respondent.

EXHIBIT G

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 18, 1972

Before

HON. LUTHER M. SWYGERT, *Chief Judge*

HON. JOHN PAUL STEVENS, *Circuit Judge*

MY STORE, INC.,
Petitioner,

No. 14,770 *vs.*

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ADJUDICATION AND ORDER ON CIVIL CONTEMPT

The National Labor Relations Board having filed a petition to adjudge My Store, Inc., and Pasquo Podeschie, its president, in civil contempt and for other civil relief, because of their refusal to comply with the decree of the Court entered July 6, 1965; and the Court having by order of April 22, 1968, found and adjudged My Store, Inc. and Pasquo Podeschi in civil contempt of the said decree, and directed that Pasquo Podeschi purge himself of his con-

tempt by causing the Company to make bona fide and valid offers of reinstatement to Harold E. Banfield, Mrs. Carolyn Fleming Anderson, Robert L. Kearney, Delores M. Reed, Frank J. Sartore, Jr., Joseph Sedlacek, Charles A. Shanks, Donald Spindel, James Waterman, William Wiggs, Arlin Farthing, and Kenneth W. Reed; and the Court having by order of June 14, 1968, adjudged that respondents My Store, Inc. and Pasquo Podeschi had satisfied the terms of purgation contained in the order of April 22, 1968, by making valid offers of reinstatement to the twelve named employees, and remanded the cause to the Board for further proceedings to determine (a) what specific sums in backpay are due to the employees of My Store, Inc., named in the April 22, 1968 contempt order, (b) what amount of out-of-pocket expenses is due the Board which My Store, Inc. has upon demand, refused to pay to the Board, and (c) after determining (a) and (b), what appropriate notice should My Store be ordered to post and maintain, and,

The Board having on February 27, 1970, in 181 NLRB No. 47 computed backpay in accordance with said remand, and the Court having approved said computation as modified in its opinion issued September 14, 1972; it is upon all the proceedings heretofore had herein

ORDERED that My Store, Inc., its officers, directors, agents and representatives, shall further purge the Company of its contempt by:

1. Paying to the twelve employees named below as net backpay the amounts set forth opposite their respective names, together with interest thereon at the rate of 6% per annum, but no interest shall run or accrue on that part of the awards which represents lost wages for the periods when the Union advanced loans that were equivalent to the take-home pay:

Harold E. Banfield	$13,834.71
Mrs. Carolyn Fleming Anderson	1,564.51
Robert L. Kearney	8,432.48
Delores M. Reed	6,899.90
Frank J. Sartore, Jr.	11,494.76
Joseph Sedlacek	5,012.01
Charles A. Shanks	4,589.79
Donald Spindel	3,582.75
James Waterman	0.00
WilliamWiggs	9,571.55
Arlin Farthing	5,974.60
Kenneth W. Reed	573.16

Appropriate sums shall be withheld by the employer in accordance with federal and state tax requirements.

2. Reimbursing the Board in the amount of $1985.44 for its out-of-pocket expenses incurred in the preparation and presentation of the contempt matter as set forth in the Board's Bill of Expenses, which is hereby approved.

3. Immediately posting in conspicuous places, at its Taylorville, Illinois, store, including all places where notices to employees customarily are posted, for a period of sixty (60) consecutive days, copies of the Notice appended hereto signed by a duly authorized representative of My Store, Inc.; and by maintaining such Notice and a copy of the order of April 22, 1968, and of this adjudication in clearly legible condition throughout such posting period, and insuring that they are not altered, defaced or covered by any other material.

4. Filing a sworn statement with the Clerk of the Court and a copy thereof with the Regional Director for the Fourteenth Region of the Board notifying the Clerk and the Director within twenty (20) days after the entry of this order, what steps My Store, Inc. has taken to comply with the directions herein contained and by making a further sworn return to the Clerk and the Director at the end of the posting period.

5. Upon failure of compliance with any of the foregoing within 20 days from the date hereof, the Board may move the Court for issuance of a writ of attachment against any officer responsible therefor or for such other relief as the Court may then deem appropriate.

NOTICE TO EMPLOYEES

Pursuant to a Decree of the United States Court of Appeals for the Seventh Circuit

This is to advise our employees that on April 22, 1968, the United States Court of Appeals for the Seventh Circuit adjudged My Store, Inc. and Pasquo Podeschi, its president, in civil contempt of the Court because the Company failed to make valid and bona fide offers of reinstatement to the 12 unfair labor practice strikers named below. The reinstatement of these employees had been ordered by a decree of the Court which was entered on July 6, 1965.

After the contempt adjudication of April 22, 1968, to-wit, on April 30, 1968, we did make valid and bona fide reinstatement offers to these employees. In addition to offering reinstatement to these employees, we have been directed by the Court to reimburse them for the loss of wages which they sustained because we did not reinstate them, in the following amounts:

Harold E. Banfield	$13,834.71
Mrs. Carolyn Fleming Anderson	1,564.51
Robert L. Kearney	8,432.48
Delores M. Reed	6,899.90
Frank J. Sartore, Jr.	11,494.76
Joseph Sedlacek	5,012.01
Charles A. Shanks	4,589.79
Donald Spindel	3,582.75
James Waterman	0.00
William Wiggs	9,571.55
Arlin Farthing	5,974.60
Kenneth W. Reed	573.16

We have also been ordered to reimburse the National Labor Relations Board in the amount of $1985.44 to cover the Board's out-of-pocket expenses in preparing and presenting the civil contempt case against us.

We further notify our employees that all our employees are free to become or remain members or assist or not to become or remain members or assist United Retail Workers Union or any other labor organization, and we will not discriminate in regard to hire or tenure of employment against any employee because of membership in, or activity on behalf of, any labor organization. And we will comply with all of the other provisions of the Court's decree of July 6, 1965.

Copies of the contempt orders of April 22, 1968 and October 18, 1972, are posted alongside this Notice.

My Store, Inc.

By _____ _____

(Title)

_____

Pasquo Podeschi, Individually

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 210 North 12th Blvd., Room 448, St. Louis, Missouri 63101, Telephone (314) 622-4167, if they have any questions concerning this notice or if they have information that its provisions are being violated.

EXHIBIT H

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 71-1491
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
MY STORE, INC.,
Respondent.

On Application for Enforcement of a Supplemental Decision and Order of the National Labor Relations Board.

ARGUED MAY 25, 1972—DECIDED SEPTEMBER 14, 1972

Before MR. *Justice* CLARK,[1] SWYGERT, *Chief Judge,* and STEVENS, *Circuit Judge.*

SWYGERT, *Chief Judge.* The National Labor Relations Board petitions for the enforcement of its supplemental order issued against respondent My Store, Inc. on February 7, 1970.[2] The order requires that respondent pay twenty of its employees specified amounts with interest as backpay flowing from unfair labor practices which had been engaged in by the respondent.

1. The Honorable Tom C. Clark, Associate Justice of the United States Supreme Court (Retired), is sitting by designation.

2. The Board's supplemental decision and order are reported at 181 N. L. R. B. 47 (1970).

A brief history of the case will be undertaken. Pasquo Podeschi is president and the operating head of My Store, Inc., a supermarket in Taylorville, Illinois. Organization of the company's employees by the United Retail Workers Union (Independent) began in December 1962. Following the filing of an NLRB petition, an election was held in February 1963; the union won. Shortly thereafter, the parties began negotiating for a contract, but only after the union had filed and then dismissed various unfair labor charges against the employer. On May 2, 1963 the union struck respondent and on May 8 filed the charges on which these proceedings are based. On December 9, 1963, a trial examiner found that My Store had violated sections 8(a) (1), (3) and (5) of the National Labor Relations Act. The Board affirmed the trial examiner on May 25, 1964. The Board found *inter alia* that the company had discriminatorily cut the hours of employment of certain union adherents, that the strike had been motivated by the company's unfair labor practices, and that the company had unlawfully rejected the union's unconditional request of July 11, 1963 that the strikers be reinstated. As part of the remedy the Board ordered the company to offer those strikers who had made unconditional requests to return, full and immediate reinstatement to their former or substantially equivalent positions, and to compensate them for any loss of pay as a result of the company's unfair labor practices. On April 7, 1965 this court enforced the Board's order in full. *NLRB v. My Store, Inc.*, 345 F. 2d 494 (7th Cir.), *cert. denied*, 382 U. S. 927 (1965).

On October 17, 1966 the Board filed a petition with this court asking that the company and its president be adjudged in civil contempt for willfully failing to offer the strikers reinstatement as required by the court's decree. The company defended on the ground that it had made offers of reinstatement to the twenty strikers in September and Oc-

tober 1963; the Board responded that the offers were invalid.[3] On April 22, 1968 this court adjudged the company and its president in civil contempt as to twelve strikers, on the grounds that the offers of reinstatement "were not valid and were made willfully and with knowledge that they were not in compliance with the decree of this court."

The company thereafter made offers of reinstatement to the twelve strikers, and this court on June 14, 1968, having determined that the purgative terms of its contempt order had been satisfied by the company's offers, remanded the case to the Board to determine "what specific sums in backpay are due what employees" of the company.

Pursuant to a backpay specification and appropriate notice, a hearing was held to determine (1) whether the strikers not included in the contempt litigation had forfeited their rights to reinstatement, (2) the specific amounts of backpay due to all the strikers, and (3) the amounts of backpay due to two nonstrikers who had suffered discriminatory wage reductions. The specification alleged that the backpay period for most of the twenty strikers ran from various periods in 1963 until June 30, 1968, by which time the company had made reinstatement offers to twelve of the strikers. As to the other eight strikers not included in the contempt adjudication, the specification alleged that their backpay period would continue to run until the company made adequate offers of reinstatement to them. At the conclusion of the hearing the examiner recommended backpay awards to twenty of the discriminatees, the respective awards being based on the difference between each discriminatee's loss

3. As to eight of the twenty strikers, however, the Board requested that it be permitted to investigate further, in order to determine whether these strikers had, by their responses to the offers, forfeited their rights to reinstatement.

of pay due to the company's unfair labor practices and his interim earnings from other employment.

The Board on the basis of the proceedings before the examiner determined that as of June 30, 1968, the discriminatees were entitled to various sums with interest. The total award was approximately $97,000. The Board further determined that seven of the eight discriminatees who were not included in the contempt proceedings had not forfeited their rights to reinstatement by their responses to the company's valid reinstatement offers, and that since as of June 30, 1968, they had not received valid offers of reinstatement, their backpay period would continue to run until they either removed themselves from the labor market or received valid offers of reinstatement.

I

In reviewing the Board's supplemental order, we are constrained to follow the Supreme Court's recent pronouncement pertaining to the Board's authority over the backpay remedy:

> We start with the broad command of Section 10(c) of the National Labor Relations Act, 29 U. S. C. Section 160(c), that upon finding that an unfair labor practice has been committed the Board shall order the violator "to take such affirmative action, including reinstatement with or without backpay, as will effectuate the policies" of the Act. This Court has stated that the remedial power of the Board is "a broad discretionary one, subject to limited judicial review." *Fibreboard Corp.* v. *N. L. R. B.*, 379 U. S. 203, 216 (1964). . . . As with the Board's other remedies, the power to order backpay "is for the Board to wield, not for the courts." *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346 (1953). "When the Board 'in the exercise of its informed discretion,' makes an order of restoration by way of backpay, the order

'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *Id.* at 346-347.

One of the defenses interposed by the respondent relates to the union's payment to the strikers during the strike of amounts equal to the wages they would have received from the company had they been working. According to the trial examiner's findings, the union's National Executive Director met with the employees a few days prior to the strike and informed them that if they decided to strike in response to the company's unfair labor practices, the union would advance them loans equivalent to their net wages to be repaid when the company was found to be in violation of the Act and ordered to make restitution. The employees decided to strike under those conditions, agreed to the loan proposal, and later signed formal loan agreements.

During the strike the strikers received weekly checks from the union equal in amount to their net take-home pay. This practice was continued even when the strikers were unable to picket because of illness or job searches. The strikers, however, received none of the usual benefits afforded union employees such as hospitalization and fringe benefits. The examiner concluded: "The Union considered the discriminatees essentially as locked-out strikers who were receiving strike benefits which would eventually be repaid to the Union, and not as its employees."

Because of an administrative inadvertence, the union initially treated these payments as income for tax purposes, and accordingly made social security and tax payments on behalf of the strikers. At the end of 1963, when the error was discovered, the union filed amended tax forms and received credit for the sums erroneously reported.

Besides receiving their net take-home pay from the union,

two strikers, Frank Sartore, Jr. and Harold Banfield, each received $15.00 per week for additional work on the picket line. These amounts were treated as income by the union for tax purposes and were deducted as interim earnings from the backpay awarded these two strikers.

The company argues that because of the money received by the union, the strikers sustained no loss in wages during the period for which the backpay awards were granted. The argument must be rejected. Under the arrangement with the union, the sums received by the strikers, except for the additional amounts paid Sartore and Banfield for picket line duties, were not earned income. The strikers were required to repay the amounts received as "loans" when the company honored its backpay obligations to them. Moreover, even if there had been no obligation to reimburse the union, the payments would still qualify as collateral strike benefits and exempt as interim earnings unless received as a condition precedent to, or in compensation for, picketing or other services. *Golay & Co.* v. *NLRB*, ... F. 2d ..... (7th Cir. 1971). *Cf. NLRB* v. *Gullett Gin Co.*, 340 U. S. 361 (1951).

II

The company insists that no backpay may be awarded beyond the date of the staggered offers of reinstatement made during the September-October 1963 period, despite the fact that the invalidity of these offers is no longer in dispute. It argues that under the recent decisions of the Board in *Southwestern Pipe, Inc.*, 179 N. L. R. B. 364 (1969), *O'Daniel Oldsmobile, Inc.*, 179 N. L. R. B. 398 (1969), and *National Business Forms*, 189 N. L. R. B. 136 (1972), the backpay of the strikers should have been tolled as to those strikers who refused the September-October 1963 offers because they wanted to return as a group.

In *O'Daniel Oldsmobile, Inc.* the Board applied *South-*

western Pipe, interpreting the case as holding that where an employer makes staggered offers of reinstatement in good faith and the strikers refuse them because they wish to return as a group, the offers toll backpay as to those strikers who refuse the offers even though the strikers' right to reinstatement is unaffected. *O'Daniel Oldsmobile, Inc.,* 179 N. L. R. B. at 398 n. 4.

In its decision in the instant proceeding, the Board discussed *Southwestern Pipe* and the two related cases and found them to be inapposite. The Board said:

> Since the Court herein specifically found that Respondent's *motive* in offering reinstatement on a staggered basis, as indicated by its "animosity" to the Union, militated against a finding that such offers were valid, it seems clear that backpay cannot be tolled, even though several discriminatees insisted on returning as a group. Not only does the rule set forth in *Southwestern Pipe* and *O'Daniel Oldsmobile* require the absence of a discriminatory motive, but it is clearly inapplicable to a situation where, as here, a Court has found that Respondent made such staggered offers of reinstatement "willfully and contumaciously with knowledge that they were not in compliance" with the Board's court-approved order.

The company counters that both *Southwestern Pipe* and *O'Daniel Oldsmobile, Inc.* involved employers whose conduct was not only found to be violative of the Act but also reflective of a discriminatory motive and a general anti-union animus. Thus, they maintain, there is no difference between those cases and the instant one. The General Counsel's response to this argument is persuasive. As he points out, while the unfair labor practices found in those cases did mirror on anti-union animus and a discriminatory motive, this did not mean that the specific act, giving staggered offers of reinstatement, also was done in bad faith. In *Southwestern Pipe* the employer's refusal to reinstate some

of the strikers was based on a good faith but erroneous opinion that they were economic rather than unfair labor practice strikers. In *O'Daniel Oldsmobile, Inc.* the employer's offer of reinstatement was based on a general agreement with the union to replace the strikers as vacancies occurred.

Here, there is no question about the company's bad faith in making the staggered offers which required a response within one day, and at most three days, after the offers were mailed. In the contempt proceedings, we had concluded that the company's offers were made "willfully and contumaciously with knowledge that they were not in compliance" with our original order. That finding completely distinguishes this case from *Southwestern Pipe* and *O'Daniel Oldsmobile, Inc.*

III

The company resists enforcement of the supplementary order on the further ground that the strikers willfully incurred a loss of earnings by not making a diligent job search during the backpay periods in question. It argues that the strikers' obligation to mitigate damages by seeking other employment was "undermined" by the union's payment of "full wages" during the strike. In particular, it canvasses the evidence relating to three individual strikers, suggesting that these are typical of the entire group. Based upon its analysis of these cases, it contends that the Board's rulings are erroneous. We do not agree. In the first place, it is settled that the courts will not undertake a de novo review of the Board's backpay computations. *Winn-Dixie Stores, Inc.* v. *NLRB*, 413 F. 2d 1008 (5th Cir. 1969). Secondly, the trial examiner's findings indicate a careful, painstaking evaluation of the evidence relating to each of the discriminatees. Finally, our examination of the record as a whole convinces us that the examiner's findings,

adopted by the Board, are supported by substantial evidence. In these circumstances, it would serve no useful purpose to prolong this opinion by dissecting the bits and pieces of the evidence as to each of the twenty discriminatees.

The company strongly argues that since the strikers received the equivalent of their wages from the union during the strike there was little incentive on the part of these people to seek outside employment. But this is only a permissible inference from the facts. It does not by itself prove that the strikers failed to make a diligent job search. The trial examiner, after reviewing all the evidence, acknowledged that this could have been a factor but concluded: "The fact that some of them may not have searched as diligently for work before the Union ceased making the loans as they did afterwards is an indication of the impelling necessity to obtain employment and does not mean that they were not searching for reasonably equivalent employment prior to that time." We think this conclusion was warranted.[4]

Subsequent to oral argument, the company has called our

4. In *NLRB* v. *The Madison Courier, Inc.*, No. 24,808 (D. C. Cir., filed Aug. 9, 1972), the court observed:

> The application of rigid rules regarding the effect of picketing or receiving union strike benefits during the back pay period on the determination of mitigation doctrine questions has similarly been eschewed. The fact that unfair labor practice strikers received strike benefits does not diminish their right to receive back pay, *providing* they otherwise made reasonable efforts to locate suitable interim employment. Likewise, the fact that such persons engaged in picketing during the back pay period does not automatically negate their right to reimbursement by their employer. However, like the receipt of strike benefits, picket line activity does *not* relieve the discriminatees of the obligation of making reasonable efforts to obtain appropriate interim employment.

We are in agreement with this statement of the law. Moreover, we are satisfied that these are the criteria which were in fact applied by the examiner in the instant proceeding.

attention to *NLRB* v. *The Madison Courier, Inc.*, No. 24,808, decided by the District of Columbia Circuit on August 9, 1972. We are in general agreement with the views expressed in that case, both in the majority and the concurring opinions, but do not believe its holding requires any modification of our conclusions. In that case, the court looked with disfavor on the Board's considering the backpay claimants as a single group rather than "examining their respective efforts to locate interim employment on an individualized basis." The court concluded: "Such a disposition clearly violated the recognized principle of *treating each particular claimant separately* in determining his right to backpay." This is not the situation here. The trial examiner examined and evaluated the facts peculiar to each claimant. He was discriminating in his disallowance of backpay when the facts warranted that during certain periods the strikers had not made an adequate job search. For example, he disallowed backpay for claimant Harold Banfield for a particular period after the start of the strike because the claimant was more interested in maintaining the picket line than in finding an outside job.[5] Similarly, the examiner after an extensive review of the evidence pertaining to claimant Frank Sartore found that Sartore had taken

5. On this point the examiner said:

> Banfield's forms and his testimony indicate to me that from the inception of the strike and particularly after he and F. Sartore starting sharing responsibility for the picketing, through the third quarter of 1964, he was not interested in leaving the picket line for employment elsewhere, but in effect withdrew from the labor market and involved himself solely with the strike. When the Union in the fall of 1964 made it clear to the discriminatees that they had to actively seek employment to be considered in the labor market, Banfield and some others for the first time started to really search for other work. I have concluded from the testimony here and find that Banfield was not in the labor market through the third quarter of 1964, and accordingly determine that his backpay claims for the period from July 11, 1963, through September 30, 1964, should not be allowed.

himself out of the job market for a period of a year and three months after the start of the strike and thus was not entitled to backpay during that time.[6]

IV

The company's final contention is that since the employees had the benefit of the union loans, no interest should be allowed on their backpay. There is no question that the Board has the authority to allow interest. *Revere Copper & Brass, Inc.* v. *NLRB*, 324 F. 2d 132 (7th Cir. 1963). The fact that strikers received some payment from the union during part of the backpay periods should not in itself disqualify them from receiving *any* interest on the awards. However, interest should not have been allowed on that part of the awards which represents lost wages for the periods when the union advanced loans that were equivalent to the claimants' take-home pay. The loan agreements specifically provided that the loans should bear no interest. Thus, it would be inequitable to require the respondent to pay interest on the sums represented by loans since the claimants themselves suffered no loss of the use of those monies.

The Board's supplemental order as modified will be enforced.

---

6. The examiner stated in part:

> On the basis of these exhibits and his testimony, I have concluded that from the third quarter of 1963 through the third quarter of 1964 Frank Sartore withheld himself from the labor market and continued to engage in and to some extent direct picket line activities. While thus engaged Sartore was receiving his strike benefit loan and the added $15 per week which meant that he had better than $100 per week to support his wife and family of five children.
>
> Since I find that Sartore did not seek employment during that five-quarter period, I further find that he is not entitled to backpay for that period and so strike those five quarters from the backpay specification.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-741

MY STORE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. On May 25, 1964, the Board issued a decision in which it found that petitioner had engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, that the ensuing strike was attributable to these unfair labor practices, and that petitioner had further violated the Act by rejecting the union's unconditional request of July 11, 1963, that the strikers be reinstated. The Board ordered petitioner, *inter alia,* to offer those strikers who had made unconditional requests for reinstatement full and immediate reinstatement to their

former or substantially equivalent positions, and to make them and other employees who were discriminated against whole for any loss of pay suffered as a result of the unfair labor practices. 147 NLRB 145. The court of appeals enforced this order in full on April 7, 1965 (345 F. 2d 494), and this Court denied certiorari on November 22, 1965 (382 U.S. 927).

Thereafter, pursuant to the Board's petition, the court of appeals held petitioner and its president in civil contempt for failing to make valid offers of reinstatement to the strikers (Pet. App. A1–A9).[1] The court rejected petitioner's contention that the staggered offers it had made to the strikers during the strike were valid, finding that such offers were motivated by animosity toward the union and were made "wilfully and contumaciously with knowledge that they were not in compliance with the Board's order of May 25, 1964, enforced by the Decree of this court entered July 6, 1965" (Pet. App. A7–A8). The court ordered petitioner's president, under pain of arrest, to comply with the Board's order within 10 days by making valid offers of reinstatement to the strikers (Pet. App. A8). No petition for a writ of certiorari was filed to review the contempt adjudication.

2. On June 14, 1968, the court of appeals, finding that the terms of purgation contained in its earlier order were satisfied, ordered that the case be remanded to the Board to determine the specific amounts of backpay due the strikers, the Board's out of pocket

[1] The court's order was issued on February 23, 1968, and modified on April 22, 1968.

expenses, and the content of the notices to be posted by petitioner (Pet. App. A10–A11). On February 27, 1970, the Board, after a further hearing, issued a Supplemental Decision and Order awarding backpay to the strikers of approximately $97,000, plus interest at 6 percent (Pet. App. A12–A17). The court of appeals enforced the Board's supplemental order, with one minor modification relating to the award of interest (Pet. App. A18–A28).

3. Petitioner's primary contention in the court of appeals was that the Board's supplemental decision in this case was inconsistent with other Board decisions holding that staggered offers of reinstatement, *made in good faith,* toll backpay as to those strikers who, preferring to return as a group, refused the offers. See *Southwestern Pipe, Inc.,* 179 NLRB 364; *O'Daniel Oldsmobile, Inc.,* 179 NLRB 398. No substantial legal issue is raised by the court's acceptance of the Board's holding that those cases were distinguishable on the basis of "the company's bad faith in making the staggered offers which required a response within one day, and at most three days, after the offers were mailed" (Pet. App. A25).[2] Moreover, the Board and the court were correct in holding that petitioner's bad faith in making the September–October 1963 reinstatement

[2] Exhibit D appended to the petition (Pet. App. A12–A17), setting forth the Board's Supplemental Decision and Order on the backpay issue, omits part of the final paragraph of point 1 in the Board's opinion (bottom of Pet. App. A15). For the information of the Court, we reproduce that portion of the opinion (point 1) in its entirety in the Appendix to this Memorandum.

offers was not open to redetermination in the backpay proceedings. The bad faith question was resolved against petitioner in the contempt proceedings, and that determination became final when petitioner did not seek timely review of the contempt adjudication by this Court (Pet. App. A7).[3]

4. Petitioner argues that the Board and the court erred in stating that the September–October 1963 reinstatement offers were in violation of the Board's May 1964 order and the court's July 1965 decision enforcing that order, since the original offers preceded these determinations. The offers, although made in bad faith, obviously could not be held to have been made in contempt of subsequently issued decrees; and we do not believe that the court, although its language was imprecise, intended to assert such a proposition. Rather, in finding that the reinstatement offers were in willful violation of the decree (Pet. App. A8), the court of appeals merely meant that petitioner had wrongfully continued to rest on the original, unlawful offers instead of making new, valid offers of reinstatement, as the Board order and the enforcement decree required. The reason liability for backpay was not tolled by the offers of reinstatement in the instant case, as it had been in *Southwestern Pipe* and *O'Daniel Oldsmobile,* was that the offers had been

[3] The fact that the court of appeals may have directed immediate compliance with its contempt judgment (Pet. 10) did not excuse petitioner's failure to seek timely review of that judgment. The making of new offers of reinstatement under the compulsion of the court's order did not moot the legal issue whether the original offers were valid.

found not to have been made in good faith, but to have been motivated by anti-union animus.[4] The fact of petitioner's subsequent contempt, however viewed, had no effect on the outcome of the backpay determination.

For these reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

DECEMBER 1972.

---

[4] As the Board stated in its Supplemental Decision and Order (App., *infra*, p. 7):

> Since the Court herein specifically found that Respondent's *motive* in offering reinstatement on a staggered basis, as indicated by its "animosity" to the Union, militated against a finding that such offers were valid, it seems clear that backpay cannot be tolled, even though several discriminatees insisted on returning as a group. * * *

APPENDIX

Excerpt From the Supplemental Decision and Order of the National Labor Relations Board (181 NLRB 321–322)

* * * *

1. We agree with the Trial Examiner that the question of the validity of Respondent's offers of reinstatement is *res judicata*. Despite the Board's court-approved order that Respondent reinstate those unfair labor practice strikers who had made unconditional offers to return to work on July 11, 1963, discharging replacements, if necessary, Respondent made offers to the approximately 20 strikers on a staggered basis, to no more than three employees at a time, while retaining eight replacement employees, during the September–October 1963 period. Thereafter, the Board petitioned the Court for adjudication of Respondent in civil contempt, maintaining that the offers to all strikers were invalid. The Court, as noted above, specifically found that the offers were invalid and made "willfully and contumaciously with knowledge that they were not in compliance" with the Board's order.

Respondent was only required to make new, valid offers of reinstatement to 12 strikers, which it did in purgation of the civil contempt adjudication, since the Board had informed the Court that it wished to consider herein the status of the remaining discriminatees in light of the holding in *N.L.R.B.* v. *Rice Lake Creamery Co.*, 365 F. 2d 888 (C.A.D.C.). While the question of the validity of Respondent's offers of reinstatement is *res judicata*, in any event, we agree with the Trial Examiner that the offers were invalid

as not giving the discriminatees adequate time within which to respond. See, e.g., *Betts Baking Company*, 173 NLRB No. 157; *Harrah's Club*, 158 NLRB 758; *Thermoid Company*, 90 NLRB 614. Therefore, since it is apparent that Respondent was not mislead by the strikers' responses to the offers, we adopt the Trial Examiner's treatment of the reinstatement and backpay rights of the eight employees whose status he determined in light of the holding in *Rice Lake*.

Subsequent to the Trial Examiner's Supplemental Decision herein, the Board, in *Southwestern Pipe, Inc.*, 179 NLRB No. 52, reversed prior law and held, in the language of a companion case, *O'Daniel Oldsmobile, Inc.*, 179 NLRB No. 55, that "where striking employees make an unconditional offer to return to work and the employer *without a discriminatory motive*, offers reinstatement to them as less than a group, backpay is tolled as to those strikers who receive offers of reinstatement but refuse then to return to work." [Emphasis supplied.] In light of those decisions, we granted Respondent's motion for permission to file a supplemental brief herein, since several of the strikers had refused Respondent's piecemeal offers of reinstatement, asserting their desire to return as a group. For the following reasons, we do not agree with Respondent's contention that backpay liability must be tolled as of the date each refused its seriatim offers of reinstatement in September–October 1963.

Since the Court herein specifically found that Respondent's *motive* in offering reinstatement on a staggered basis, as indicated by its "animosity" to the Union, militated against a finding that such offers were valid, it seems clear that backpay cannot be tolled, even though several discriminatees insisted on returning as a group. Not only does the rule set forth

in *Southwestern Pipe* and *O'Daniel Oldsmobile* require the absence of a discriminatory motive, but it is clearly inapplicable to a situation where, as here, a Court has found that Respondent made such staggered offers of reinstatement "willfully and contumaciously with knowledge that they were not in compliance" with the Board's court-approved order. Finally, while the Board, in *Southwestern Pipe,* specifically noted that its new position in this area is consonant with that taken by the present court in *N.L.R.B.* v. *Robert S. Abbott Publishing Co.,* 331 F. 2d 209 (C.A. 7), where it disagreed with the Board's now-reversed rule, the same Court, in the civil contempt proceeding herein, distinguished *Abbott* in much the same manner as *O'Daniel Oldsmobile* describes the holding of *Southwestern Pipe,* by saying that *Abbott* involved an employer who had exhibited no antiunion animus.

* * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-741

MY STORE, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED RETAIL WORKERS UNION,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MEMORANDUM OF RESPONDENT, UNITED RETAIL WORKERS UNION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

UNITED RETAIL WORKERS UNION,
Respondent,

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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MEMORANDUM OF RESPONDENT, UNITED RETAIL WORKERS UNION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PRELIMINARY STATEMENT.

Respondent, United Retail Workers Union, the Intervenor below, adopts for the purpose of this Memorandum the material in the Memorandum in Opposition of the National Labor Relations Board.

INTRODUCTION.

The Union Respondent respectfully opposes the granting of the Employer's petition for *certiorari* as it raises no substantial legal questions as required this Court's Rule 19(1), and is but a further example of Petitioner's persistent record of delay described in detail herein. It is unworthy of this Court's time and should be denied forthwith.

Petitioner attempts to play upon the Court's sympathy by asserting its petition was prepared by a poor "country lawyer" (p. 18), little versed in court or administrative procedures, and to such end states that one of the legal questions presented is whether the Petitioner "had a raw deal from his government" (sic).

The petition blandly notes it will not be "cluttered up with references to a record too voluminous to expect a busy Court to probe at this stage of the 'game' " (p. 3), and then hopefully safe from any check against the record improperly attempts to reargue the issues of the main case it lost six years ago in 147 N. L. R. B. 145, affm'd 345 F. 2d 494 (C. A. 7), *cert. denied,* 382 U. S. 927.

In doing so it plunges into what can be called nothing less than an emotional bath concerning a "mom & pop" store owned by a man "from a big family," a "push cart peddler, who quit school to help out", etc., etc., and built up a large enterprise, who although a "bootstraps rugged individualist" was "meek as a mouse!"

It was no "poor country lawyer" who drew such a petition; nor was it a "poor country lawyer" who has kept this case going for **upwards of ten years** without his client ever having spent a cent in compliance with the law. Only an artful lawyer could accomplish such a record of delay

which now rivals that of *Jarndyce* v. *Jarndyce,* Dicken's infamous case!

STATEMENT.

Little need be done to expose this pretense and Petitioner's obdurate opposition to the law other than point to the record dates on file with the Clerk of this Court or stated in the main decision below, 345 F. 2d 494:

12/62 Employees of Petitioner start organizational campaign.

2/21/63 Employees vote Respondent union as their bargaining representative in an National Labor Relation Board election.

5/63 Unfair labor practice charges filed by Respondent union with National Labor Relations Board as Petitioner failed to bargain and engaged in other unlawful action.

12/63 Trial Examiner upholds charges and finds Petitioner a deliberate violator of the law.

5/64 National Labor Relations Board decision issued affirming the Trial Examiner, finding numerous law violations by Petitioner, and ordering backpay. 147 N. L. R. B. 145.

4/7/65 Seventh Circuit Court of Appeal's decision enforcing the Board's order, 345 F. 2d 494.

6/4/65 Petitioner's motion for rehearing of Court's order denied.

11/22/65 U. S. Supreme Court denies *certiorari,* 382 U. S. 927.

This last date marks two years and nine months, almost to the day, for the entire administrative and judicial process to be completed.

10/66 Board is forced by Petitioner's continued intransigence for a year to petition the Court of Appeals to hold Petitioner and its owner in contempt.

12/66 The Court refers the matter of contempt to a special master and a long hearing ensues with full briefs.

11/67 The special master files his report with the Court.

4/7/68 The Court of Appeals issues its order upon the report, adjudging in civil contempt Petitioner and also its owner, one Podeschi, since he had knowledge and the power to make Petitioner comply, but "instead has aided and abetted Petitioner's refusal to comply." No petition for a writ of *certiorari* was ever filed to review this contempt adjudication. Delay and exploitation of countless procedural motions were the tactics employed.

4/68 Petitioner moves for a rehearing before the entire complement of judges of the Court of Appeals, *en banc,* counsel apparently not trusting the usual panel further.

4/68 The Court of Appeals orders summary compliance with its earlier order in 10 days, under pain of arrest of its aforesaid owner.

6/68 Petitioner having finally complied on those matters which do not cost it money, the Court of Appeals remands the back pay issue to the Board for further proceedings. 67 L. R. R. M. 2733, 2734.

Here one sees that it has taken a year and eight months just to force Petitioner to comply with a portion of the

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Court's own order—yet Petitioner's talents for avoidance of its duty to obey the law are still to be fully exercised:

10/68 The Board promptly issues its back pay specifications pursuant to the Court's order.

1/69 Trial Examiner's hearing on the specifications—full litigation and briefs.

6/69 Trial Examiner's decision ordering that back pay be paid.

2/70 Board's supplemental decision—$97,018 due the injured employees, with interest at 6%, which adds thousands more due them now because of Petitioner's protracted delaying tactics, 181 N. L. R. B. 321.

The employees are now seven years from that fateful election of February 1963 when they first sought the protection of the labor code of the country yet Petitioner has still not been made to comply with the law. Petitioner knows the amount it owes them and has the opportunity of paying its score with the public. Does it do so? Of course not:

3/70 Motion by Petitioner to extend time to file motion to reconsider the Board's $97,018 back pay decision.

6/70 Board denies Petitioner's motion to reconsider decision.

Petitioner has used up another four months—does it now comply and pay the $97,018 it owes its employees? Indeed not—accordingly the Board's overtaxed appellate section is forced to file an application for a supplemental decree with the Court of Appeals in June, 1971. Now commences another round of delaying tactics:

7/15/71 Motion to the Court to extend time to August 13, 1971 for Petitioner to answer.

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Such continued frivolous abuse of the judicial process causes the charging union, Respondent here, to file its motion to intervene and opposition to any further procedural delays before the Court of Appeals on July 20, 1971.

7/22/71 The Court grants intervention and specifically states in its order that Petitioner may have no further extension beyond August 13, 1971 to file its answer.

7/28/71 Petitioner moves to reconsider the order allowing Intervention, which is denied August 4, 1971 by the Court of Appeals.

8/13/71 Petitioner finally files its answer to Board's application for supplemental decree enforcing its $97,018 back pay award almost six years since the Supreme Court refused to review the Court of Appeals decision in the main case which originally ordered such back pay.

Presumably having been forced at last to meet the simple issue of whether it should pay the $97,018 back pay ordered to its hapless employees, Petitioner instead resorts to a flurry of additional motions delaying the case for almost a year further:

9/24/72 Petitioner moves to strike the Board's brief.

12/28/72 Petitioner moves to recall briefs to designate references.

4/28/72 Petitioner moves to change date of oral argument.

5/4/72 Petitioner moves for additional time for oral argument.

On May 25, 1972, the back pay case was finally argued before Mr. Justice Clark, and Circuit Judges Stevens and Swygert, and on September 14, 1972 the Court's unani-

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mous opinion and judgment enforcing the Board's supplemental order on the $97,018 back pay issued, ... F. 2d ——.

Petitioner does not comply even at this point but continues its obdurate delaying tactics:

9/28/72	Petitioner's motion in opposition to Board proposed order.
10/16/72	Petitioner moves to limit force of judgment by actually attempting to change its name in the judgment! Denied.
10/18/72	Mandate and adjudication issued by Court of Appeals.
11/1/72	Petitioner moves for stay—Denied.*

With such a record, Petitioner now comes a second time to this Court.

In words so apt that one might think he were particularly considering the inordinate delays of this very case, the Chief Justice of the United States, addressing the Second Circuit Judicial Conference at Manchester, Vermont on September 10, 1971, castigated delays in both trials and appeals, saying in part:

> "The public image of justice, like justice itself, is indivisible. The public does not distinguish between federal and state courts and it is not concerned with the details or interested in excuses.
>
> When a case "takes 2, 3, 5 or more years to complete, . . . people make judgments. To them 'courts

*Typical of Petitioner's *bona fides* throughout this case is its attempt here to give the impression that the Court of Appeals harshly treated it in denying such stay, asserting its motion was "supported by a performance bond" (p. 18); this assertion is incorrect. Its motion merely stated it was "prepared" to post a bond and was not accompanied by one, as it would have this Court believe. Some eight weeks of negotiation passed before it presented an order to the Court of Appeals for the deposit of $112,000 of bank certificates of deposit with the Court Clerk in lieu of bond.

TOO CLOSE IN CENTER

are courts,' 'jails are jails' 'delay is delay.' . . . They are paying the bills . . . and they want results.

"What the public thinks, therefore, becomes the measure of public confidence in the courts, and that confidence is indispensable."

"This is . . . a matter of . . . making sure that no cases are delayed by someone exploiting procedure for the sole purpose of delay . . . In civil cases in which large public interests are at stake the supervisory techniques we apply to criminal cases must also be used.

"Our immediate task, therefore, is to develop methods of identifying the cases that are likely to fail within (such group) and then make sure that no unavoidable delays are exploited to defer the disposition of such cases.

"It is not a program for the future, but a program for now, . . . It needs action."

Where can a more vivid example of delay be found than the ten years of Petitioner's contemptuous twists and turnings in this case, which have yet to be ended?

$100,000 and more in back pay and interest has long been due the aggrieved employees, yet Petitioner continues to "exploit procedure to defer disposition" of the case.

The petition for writ of *certiorari* should be denied.

Respectfully submitted,

UNITED RETAIL WORKER'S UNION,
Respondent.

Russell Packard,
One North La Salle Street,
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January 2, 1973.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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STATEMENT.

This Reply Brief is filed pursuant to paragraph 4 of Rule 24 of the Rules of this Court (USCA Title 28, Supreme Court Rules, p. 41), because the Memorandum filed with this Court has raised arguments never before urged in this proceeding, and never before mentioned by either the National Labor Relations Board or the United States Court of Appeals for the Seventh Circuit in any of its orders in this litigation.

ARGUMENT.

For the first time during the entire course of this litigation we have an admission from the Board that 1963 preceded 1965, and that offers of reinstatement made in 1963 "obviously could not be held to be made in contempt of subsequently issued decrees." (Cf., p. 4 Board Memorandum in Opposition.)

The fact of the matter is, however, that it obviously was so held in three separate orders of the Court of Appeals for the Seventh Circuit (Exhibit A to Petition, pp. 3, 4; Exhibit B, p. A. 8; Exhibit H, pp. A. 37, 38), and is reiterated in two separate orders of the Board itself. (Cf., Exhibit D to Petition, p. A. 14; Appendix to Board Memorandum in Opposition, p. 8.) These obvious distortions of fact and law are spread upon the record time after time for all to see—and wonder about.

Now at this time the Board instead of attempting to change the calendar as it has consistently done previously, seeks to change the orders of the Court of Appeals by telling this Court what the Court of Appeals really meant. This is what the Court said:

> "We hold that the offers of reinstatement made by Respondent were not valid and that the offers were made wilfully and contumaciously with knowledge that they were not in compliance with the Board's order of May 25, 1964, enforced by the Decree of this court entered July 6, 1965." (Exhibit B to Petition, p. A. 8.)

This is what the Board said:

> ". . . It (the rule in Southwestern Pipe and O'Daniel Oldsmobile) is clearly inapplicable to a situation where, as here, a court has found that Respondent made such staggered offers of reinstatement 'wilfully and contumaciously with knowledge that they were not in compliance' with the Board's court approved

order." (Exhibit to Board Memorandum in Opposition, p. 8.)

The same position is reiterated by the Court of Appeals in its opinion dated September 14, 1972. (Exhibit H to Petition, pp. A. 37, 37, 39.)

An attempt at this time to predicate contempt on an assertion that "The Court of Appeals really meant that Petitioner had wrongfully continued to rest on the original unlawful offers" only compounds the errors committed. The record shows that Petitioner in fact urged the Board to adjudicate the entire question of reinstatement and back pay in the customary manner provided in the Act by way of a back pay specification. Inexplicably, however, the Board after debating the matter for nine months decided on a punitive course by way of a petition for adjudication in civil contempt. A fact finder, who was the Court's own Master in Chancery to whom the bona fides and validity of these offers was referred, after exhaustive hearings concluded that the offers were made in good faith and in the form and manner required by good business judgment, and were made without any animus toward the Union. (Cf., Petition, pp. 8-9.) This should have concluded the matter once and for all.[1] The fact that it didn't will remain one of the mysteries of the age.

It is Hornbook law that a "contempt decree must be clear and specifically definite and concise as to what actions are contemptuous." The Supreme Court has repeatedly

1. In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2nd Cir. 1945), Judge Learned Hand stated:

> "... whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that *they 'must be treated as unassailable.' ... and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases.*" (at page 433) (Emphasis supplied.)

refused to enforce contempt decrees that are vague[2] and based on insufficient proof.[3] Moreover, they are not to be based on mere presumption.[4]

Petitioner will never know what caused the Court to summarily overrule its findings of fact without any evidence to support such action and order Pasquo Podeschi to be committed to jail.

The Court observed that it had noted "animosity" towards the Union in its original decision. The "animosity" noted by the Court in that decision is pinpointed to a time in 1962, which preceded the original election some nine or ten months prior to the making of the offers of reinstatement. (345 F. 2d 494, 497.) That Court I am sure was aware, as we all are, of the fact that animosity which may have been found to exist nine or ten months previously cannot be presumed to have been carried over *ad infinitum*.[5] The Court likewise must have been aware, as I am sure we all are, that a presumption must disappear in the face of contrary evidence. Such contrary evidence not only existed, but was sufficiently preponderant that the Court's own trier of fact found:

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2. *Terminal R. Ass'n* v. *United States*, 266 U. S. 17 (1924).

3. *Maggio* v. *Zeitz*, 333 U. S. 56 (1948).

4. Cf., Opinion of Mr. Justice Black. Wherein he said:

"I am unwilling to agree to application of res judicata that results in sending people to jail for (civil) content of court upon a measure of proof substantally the same as that which would support the rendition of a civil judgment for the plantiff" (p. 79).

5. In a recent case the Court of Appeals for the Seventh Circuit refused to presume a carryover of one month in a similar case. (*N. L. R. B.* v. *National Food Stores, Inc.*, 332 F. 2d 249 (1965).) The Court said: "The fact that Respondent was found guilty of an unfair labor practice . . . furnishes no basis for the contention it did not act in good faith." *Id.*, at 254. Cf., also *N. L. R. B.* v. *River Togs, Inc.*, 382 F. 2d 198, 206-07 (2nd Cir. 1967); *Peoples Drug Store, Inc.* v. *NLRB*, 375 F. 2d 551, 556-7 (6th Cr. 1967).

"M. That the management of My Store, Inc. held no bias nor animosity against the strikers."

We also find a complete lack of candor on the part of the Board in stating the factual situations existing in *Southwestern Pipe, Inc.*, 179 NLRB 364 and *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398. As pointed out in our petition (page 16), the employer in both cases was guilty of practically every unfair labor practice in the book—union animus, intimidation, threats, racial discrimnation, etc., etc. Moreover, in both cases there is a specific finding that the offers of reinstatement were in themselves discriminatory and in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. It requires more than clever footnotes and parenthetical distinguishing remarks to sweep these blatant and obvious facts "under the rug." Pasquo Podeschi was denied the benefit of the holdings in *South Western Pipe* and in *O'Daniel Oldsmobile* for one reason alone, and that was the prior holding of the Court of Appeals that he had "wilfully, contumaciously and with knowledge" violated a decree of that Court entered in 1965 in making of the 1963 offers.

Footnote 5 of our Petition effectively answers the argument contained on page 3 of the Board's Memorandum regarding the time limits allowed for responding to the offers of reinstatement. The Board's argument is footnoted to two Board decisions (*Betts Baking Co.* and *Harrah's Club*) which were both denied enforcement in the Courts. (Cf., Petition, p. 12, footnote 5.) Moreover, the Court of Appeals in its orders entered in 1968 never at any time made any reference to length of time for reply as being a factor in its decision. When the Court finally found this to be a factor in its opinion of September 14, 1972 (Petition, Exhibit E), it makes a misstatement which is quoted in the Board's response to the Petition that the offers of reinstatement "required a response within one day." The time for re-

sponse varied between two and five days, and is to be distinguished from the cases cited by the Board (which were denied enforcement), and in fact the *O'Daniel Oldsmobile* case where only a very few days were allowed for reporting back to work as distinguished from notifying the company. In *O'Daniel* the Board found that a three-day period allowed from the mailing of the notice to reporting to work was reasonable and cut off back pay.

One more issue involved in footnote 3 of the Board's responsive Memorandum (page 4) requires comment. This footnote states that Petitioner could have appealed the contempt citation in 1968, and is now precluded.

It is a well settled rule that a civil contempt issued against a party litigant in the course of pending proceedings is not a final order subject to appeal.[6] It is equally well settled that purging of a civil contempt in order to stay out of jail does not amount to a waiver of the right to appeal or to a confession of guilt.[7]

It should be kept in mind that the Court of Appeals' order of June 14, 1968 (Exhibit C Petition, pp. A10-11), which temporarily rescued Podeschi from "durance vile," did not conclude the matter. After remanding the case to the Board, the Court retained jurisdiction "for further appropriate proceedings in this cause" and when it entered its final judgment it also issued another "Adjudication and Order on Civil Contempt" (Petition Exhibit G, p. A31, et seq.). There can be no doubt therefore that the 1968 contempt order was one issued in the course of pending proceedings and was not a final order subject to appeal. This appeal is taken from the final judgment and the final adjudication and order on civil contempt.

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6. *Fox* v. *Capital Co.*, 299 U. S. 105 (1936); *Duell* v. *Duell*, 178 F. 2d 682 (D. C. 1949); 33 ALR 3d, 448, at 554, and cases therein cited.

7. *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); 33 ALR 3d 448 at 561, and cases therein cited.

CONCLUSION.

It is submitted that the procedures and orders targeted at Pasquo Podeschi by both the National Labor Relations Board and the U. S. Court of Appeals in this case are indefensible. He is accused of "animosity" which without any evidence to support it was presumed to continue from the time at the end of the year 1962 when he interrogated some employees about Union affiliations. Thereafter, as was said previously, Podeschi has been "meek as a mouse." Nevertheless, for the past ten years he has been exposed to a vendetta which surpasses all understanding. Podeschi has effectively been denied the due process of law which he is entitled to expect from his government. He has had a raw deal—the rawest of the raw.

Respectfully submitted,

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